Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of MCI COMMUNICATIONS SERVICES, INC., Complainant, v. WIDE VOICE, LLC, Defendant.	Proceeding Number 19-121 Bureau ID Number EB-19-MD-003

WIDE VOICE, LLC'S ANSWER EXHIBITS

Ex.	Date	Description	Bates Nos.
1.	07/02/2019	Declaration of Andrew Nickerson	WV_000001-WV_000002
2.	07/02/2019	Declaration of Carey Roesel	WV_000003-WV_000006
3.	03/16/2018	*Peerless Network, Inc. v. MCI Commc'ns. Servs.*, No. 14 C 7417, 2018 U.S. Dist. LEXIS 43044 (N.D. Ill. Mar. 16, 2018).	WV_000007-WV_000028
4.	10/10/2017	AT&T Brief in Support of Answer, *Level 3 Commc'ns, LLC v. AT&T, Inc*., 33 FCC Rcd 2388 (FCC Feb. 12, 2018) (No. 17-227).	WV_000029-WV_000073
5.	09/12/2017	Formal Complaint of Level 3 Communications, LLC, *Level 3 Commc'ns, LLC v. AT&T, Inc*., 33 FCC Rcd 2388 (F.C.C. Feb. 12, 2018) (No. 17-227).	WV_000074-WV_000124
6.	07/08/2014	Great Lakes Commc'ns Corp.'s Objections to Magistrate's Report and Recommendation, *Great Lakes Commc'ns. Corp. v. AT&T Corp*., 2015 U.S. Dist. LEXIS 181526 (N.D. Iowa June 8, 2015) (No. 13-CV-4117-DEO).	WV_000125-WV_000243
7.	*Various*	*Excerpts from* Level 3 Communications, LLC, Tariff FCC No. 4 (as revised), *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=415	WV_000244-WV_000248

8.	07/14/2017	*Excerpt from* Neutral Tandem, Inc., Transmittal Letter No. 16 and Revised Tariff FCC No. 2, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=494	WV_000249
9.	07/14/2017	*Excerpt from* Onvoy, LLC Tariff FCC No. 1, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=868	WV_000250
10.	01/01/2007	*Excerpt from* Teleport Communications Group Operating Companies, Tariff FCC No. 2, 96th Revision, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=461	WV_000251-WV_000255
11.	07/31/2018	*Excerpt from* Teleport Communications Group Operating Companies, Tariff FCC No. 2, 97th Revision, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=461	WV_000256-WV_000257
12.	08/31/2018	*Excerpt from* Teleport Communications Group Operating Companies, Tariff FCC No. 2, 98th Revision, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=461	WV_000258-WV_000259
13.	06/28/2019	*Excerpt from* Teleport Communications Group Operating Companies, Tariff FCC, 99th Revision, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=461	WV_000260-WV_000261
14.	*Various*	*Excerpts from* Verizon Telephone Companies, Tariff FCC No. 1, 6th, 18th Revisions, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=218	WV_000262-WV_000263
15.	*Various*	*Excerpts from* Verizon Telephone Companies, Tariff FCC No. 11, 3rd, 16th Revisions, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=223	WV_000264-WV_000265
16.	*Various*	*Excerpts from* Verizon Telephone Companies, Tariff FCC No. 14, 9th, 5th, 23rd Revisions, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=225	WV_000266-WV_000268
17.	*Various*	*Excerpts from* Verizon Telephone Companies, Tariff FCC No. 16, 6th, 5th, 11th, 10th, 14th Revisions, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=227	WV_000269-WV_000273
18.	07/18/2018	*Excerpt from* West Telecom Services, LLC, Tariff FCC No.1, *available at* https://apps.fcc.gov/etfs/public/tariff.action?idTariff=940	WV_000274

EXHIBIT 1

Declaration of Andrew Nickerson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of MCI COMMUNICATIONS SERVICES, INC., Complainant, v. WIDE VOICE, LLC, Defendant.	Proceeding Number 19-121 Bureau ID Number EB-19-MD-003

DECLARATION OF ANDREW NICKERSON

I, Andrew Nickerson, hereby declare as follows:

1. I am the president of Wide Voice, LLC ("Wide Voice) and in that capacity I have direct first-hand knowledge of MCI Communications Services, Inc.'s ("Verizon") failure to pay Wide Voice in full for services since September 2017. I also have direct first-hand knowledge of Wide Voice's tariffs, operations, ownership and call routing.

2. Wide Voice does not share ownership (overlapping ownership of 10% or greater) with Wide Voice Communications, Inc., Native American Telecom, LLC, and Native American Telecom-Pine Ridge, LLC.

3. For all times relevant to Verizon's Formal Complaint, I, alone, controlled the operations of Wide Voice.

4. For all times relevant to Verizon's Formal Complaint, I did not have any control over Wide Voice Communications, Inc., Native American Telecom, LLC and

Native American Telecom-Pine Ridge, LLC.

5. Verizon has failed to pay Wide Voice $407,564.42, not including late payment charges, for services it has taken from Wide Voice since September 2017.

Executed this 2nd day of July, 2019 in El Segundo, California.

Andrew Nickerson

EXHIBIT 2

Declaration of Carey Roesel

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of MCI COMMUNICATIONS SERVICES, INC., Complainant, v. WIDE VOICE, LLC, Defendant.	Proceeding Number 19-121 Bureau ID Number EB-19-MD-003

DECLARATION OF CAREY ROESEL

I, Carey Roesel, hereby declare as follows:

1. I am employed by Inteserra Consulting Group as Vice President and Consultant. Insofar as this proceeding is concerned, my primary expertise is in developing and analyzing tariffs to ensure compliance with Federal Communications Commission ("FCC") and state regulatory commission orders and regulations.

2. I have particular expertise with tariffs for switched access services. For more the 20 years I have been analyzing and studying the switched access tariffs of incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). Prior to that a managed switched access tariffs for the ILEC now known as CenturyLink. I also review FCC orders and regulations related to switched access services and tariffs in the ordinary course of my work, and I have spent many years

drafting CLEC switched access tariffs to comply with FCC and state orders and rules, including the FCC's *Transformation Order*.[1]

3. Over the course of my career, no regulatory authority has ever rejected a tariff I have drafted for failing to comply with a regulation or an order, including the FCC's CAF Order.

4. I drafted the Wide Voice Tariff provisions at issue in this complaint proceeding ("Tariff"). Wide Voice's Tariff contains widely-adopted, industry-standard provisions for implementing the *Transformation Order*. Wide Voice's Tariff accurately and faithfully benchmarks to the relevant ILEC tariff in every instance.

5. Specifically, Wide Voice's Tariff benchmarks directly to the relevant Price Cap ILEC, as required by the *Transformation Order* and related FCC regulations.

6. Pursuant to Wide Voice's Tariff, an access purchaser, like complainant MCI Communications Services, Inc. ("Verizon"), would be charged by Wide Voice the exact same amount as the competing Price Cap ILEC. Verizon does not dispute this fact.

7. Wide Voice's compliance with the *Transformation Order* and related FCC regulations is demonstrated by the following diagram:

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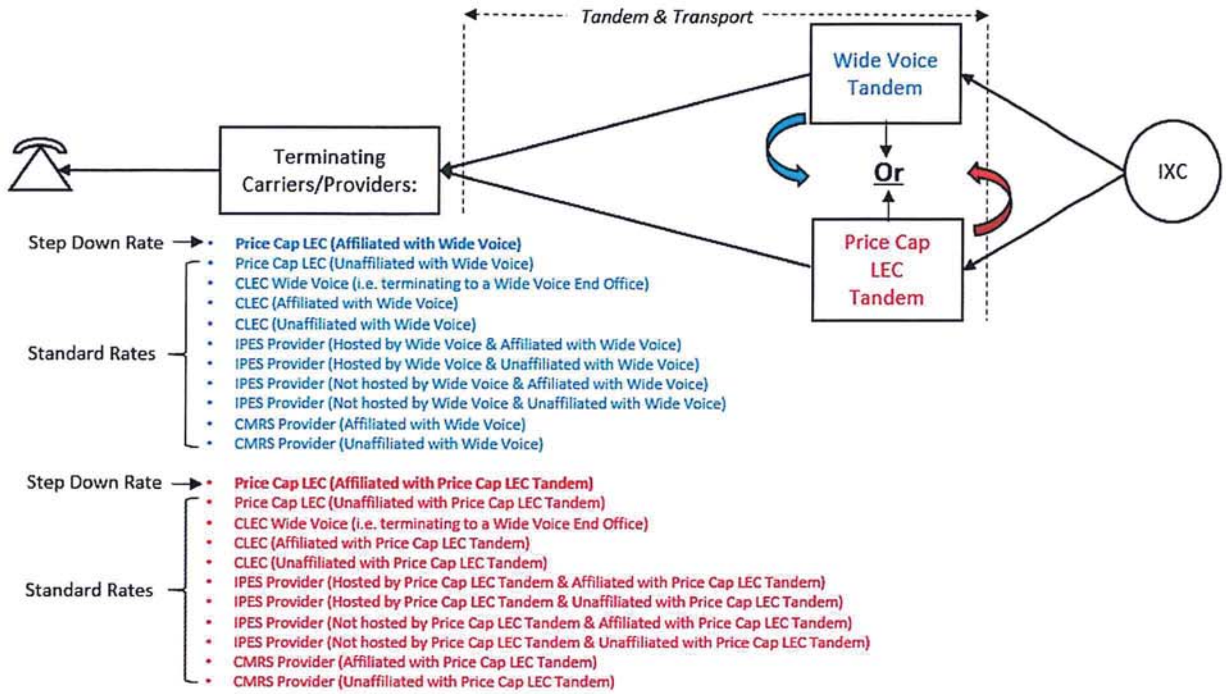
[1] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC RCD 17663, ¶ 819, 1312 (2011) ("*Transformation Order*").

Terminating Traffic via Wide Voice Tandem or Price Cap LEC Tandem



8. In these scenarios, tandem-switched transport rates are being charged by either Wide Voice or the competing Price Cap LEC for delivering traffic to various terminating carriers/providers which are defined by their regulatory classification and their affiliation with the tandem. Therefore, the key question in determining the accuracy of Wide Voice's benchmarking approach is whether its rates are the same (or lower) for a particular terminating destination when Wide Voice is the tandem provider as when the competing Price Cap LEC is the tandem provider. As I noted above, the answer is yes. The access purchaser would pay the exact same rate to Wide Voice or the competing Price Cap ILEC. Thus, Wide Voice's rates are exactly benchmarked to the competing Price Cap ILEC's rates.

9. Verizon makes some odd arguments about Wide Voice having so-called "null set" rates. It is common for ILECs and CLECs to have in their tariffs rates for offerings that are not currently being purchased, or descriptions of circumstances or conditions that impact the applicable tariffed rate, but that have not yet occurred. I am aware of no instance where a tariff was investigated or rejected because it contained either a rate element for a service not presently being purchased, or rate-impacting conditions or circumstances that had not yet been realized.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: July 2, 2019

Carey Roesel

EXHIBIT 3

Peerless Network, Inc. v. MCI Commc'ns. Servs.,
No. 14 C 7417, 2018 U.S. Dist. LEXIS 43044
(N.D. Ill. Mar. 16, 2018)

Peerless Network, Inc. v. MCI Communs. Servs.

United States District Court for the Northern District of Illinois, Eastern Division

March 16, 2018, Decided; March 16, 2018, Filed

No. 14 C 7417

Reporter
2018 U.S. Dist. LEXIS 43044 *; 2018 WL 1378347

PEERLESS NETWORK, INC., et al., Plaintiffs-Counterclaim Defendants, vs. MCI COMMUNICATIONS SERVICES, INC., VERIZON SERVICES CORP., and VERIZON SELECT SERVICES, INC., Defendants-Counterclaim Plaintiffs.

Subsequent History: Reversed by, Remanded by Peerless Network, Inc. v. MCI Communs. Servs., Inc., 2019 U.S. App. LEXIS 4900 (7th Cir. Ill., Feb. 20, 2019)

Prior History: Peerless Network, Inc. v. MCI Commun. Servs., 2015 U.S. Dist. LEXIS 66822 (N.D. Ill., May 21, 2015)

Counsel: [*1] For Peerless Network, Inc., Peerless Network of Arkansas, LLC, Peerless Network of Arizona, LLC, Peerless Network of California, LLC, Peerless Network of Colorado, LLC, Peerless Network of Connecticut, LLC, Peerless Network of Delaware, LLC, Peerless Network of the District of Columbia, LLC, Peerless Network of Florida, LLC, Peerless Network of Georgia, LLC, Peerless Network of Illinois, LLC, Peerless Network of Indiana, LLC, Peerless Network of Kansas, LLC, Peerless Network of Kentucky, LLC, Peerless Network of Louisiana, LLC, Peerless Network of Maine, LLC, Peerless Network of Maryland, LLC, Peerless Network of Massachusetts, LLC, Peerless Network of Michigan, LLC, Peerless Network of Minnesota, LLC, Peerless Network of Missouri, LLC, Peerless Network of Nevada, LLC, Peerless Network of New Hampshire, LLC, Peerless Network of New Jersey, LLC, Peerless Network of New York, LLC, Peerless Network of North Carolina, LLC, Peerless Network of Ohio, LLC, Peerless Network of Oklahoma, LLC, Peerless Network of Oregon, LLC, Peerless Network of Pennsylvania, LLC, Peerless Network of Rhode Island, LLC, Peerless Network of South Carolina, LLC, Peerless Network of Tennessee, LLC, Peerless Network [*2] of Texas, LLC, Peerless Network of Utah, LLC, Peerless Network of Vermont, LLC, Plaintiffs: Henry T. Kelly, LEAD ATTORNEY, Kelley, Drye & Warren, Chicago, IL; Catherine E. James, Michael Ryan Dover, Kelley Drye & Warren LLP, Chicago, IL.

For Peerless Network of Virginia, LLC, Peerless Network of Washington, LLC, Peerless Network of Wisconsin, LLC, Plaintiffs, Counter Defendant: Henry T. Kelly, LEAD ATTORNEY, Kelley, Drye & Warren, Chicago, IL; Catherine E. James, Michael Ryan Dover, Kelley Drye & Warren LLP, Chicago, IL.

For MCI Communications Services, Inc., Verizon Services Corp., Verizon Select Services Inc., Defendants, Counter Claimant: Scott Harris Angstreich, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Joshua Hafenbrack, Kevin J. Miller, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Nancy Anne Temple, Katten & Temple, LLP, Chicago, IL.

For Peerless Network of Arkansas, LLC, Peerless Network of California, LLC, Peerless Network of Colorado, LLC, Peerless Network of Connecticut, LLC, Peerless Network of Delaware, LLC, Peerless Network of Florida, LLC, Peerless Network of Georgia, LLC, Peerless [*3] Network of Illinois, LLC, Peerless Network of Indiana, LLC, Peerless Network of Kansas, LLC, Peerless Network of Kentucky, LLC, Peerless Network of Louisiana, LLC, Peerless Network of Maine, LLC, Peerless Network of Maryland, LLC, Peerless Network of Massachusetts, LLC, Peerless Network of Michigan, LLC, Counter Defendants: Henry T. Kelly, LEAD ATTORNEY, Kelley, Drye & Warren, Chicago, IL; Catherine E. James, Michael Ryan Dover, Kelley Drye & Warren LLP, Chicago, IL.

For Peerless Network of Michigan, LLC, Peerless Network of Minnesota, LLC, Peerless Network of Missouri, LLC, Peerless Network of Nevada, LLC, Peerless Network of New Hampshire, LLC, Peerless Network of New Jersey, LLC, Peerless Network of New York, LLC, Peerless Network of North Carolina, LLC, Peerless Network of Ohio, LLC, Peerless Network of Oklahoma, LLC, Peerless Network of Oregon, LLC, Peerless Network of Pennsylvania, LLC, Peerless Network of Rhode Island, LLC, Peerless Network of South Carolina, LLC, Peerless Network of Tennessee, LLC, Peerless Network of Texas, LLC, Peerless Network of Utah, LLC, Peerless Network of Vermont, LLC, Peerless Network of Virginia, LLC, Peerless Network of Washington, LLC, Peerless Network [*4] of Wisconsin, LLC, Peerless Network of the District of Columbia, LLC, Peerless Network, Inc., Peerless Network of Arizona, LLC, Peerless Network of Arkansas, LLC, Peerless Network of California, LLC, Peerless Network of Colorado, LLC, Peerless Network of Connecticut, LLC, Peerless Network of Delaware, LLC, Peerless Network of Florida, LLC, Counter Defendants:

MCI Communications Services, Inc., Verizon Services Corp., Verizon Select Services Inc., Counter Claimants: Scott Harris Angstreich, LEAD ATTORNEY, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Joshua Hafenbrack, Kevin J. Miller, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Nancy Anne Temple, Katten & Temple, LLP, Chicago, IL.

For Peerless Network of Georgia, LLC, Peerless Network of Illinois, LLC, Peerless Network of Indiana, LLC, Peerless Network of Kansas, LLC, Peerless Network of Kentucky, LLC, Peerless Network of Louisiana, LLC, Peerless Network of Maine, LLC, Peerless Network of Maryland, LLC, Peerless Network of Massachusetts, LLC, Peerless Network of Michigan, LLC, Peerless Network of Minnesota, LLC, Peerless Network of Missouri, LLC, Peerless Network [*5] of Nevada, LLC, Peerless Network of New Hampshire, LLC, Peerless Network of New Jersey, LLC, Peerless Network of New York, LLC, Peerless Network of North Carolina, LLC, Peerless Network of Ohio, LLC, Peerless Network of Oklahoma, LLC, Peerless Network of Oregon, LLC, Peerless Network of Pennsylvania, LLC, Peerless Network of Rhode Island, LLC, Peerless Network of South Carolina, LLC, Peerless Network of Tennessee, LLC, Peerless Network of Texas, LLC, Peerless Network of Utah, LLC, Peerless Network of Vermont, LLC, Peerless Network of Virginia, LLC, Peerless Network of Washington, LLC, Peerless Network of Wisconsin, LLC, Peerless Network of the District of Columbia, LLC, Peerless Network, Inc., Counter Defendants: Henry T. Kelly, LEAD ATTORNEY, Kelley, Drye & Warren, Chicago, IL; Catherine E. James, Michael Ryan Dover, Kelley Drye & Warren LLP, Chicago, IL.

Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

MEMORANDUM OPINION AND ORDER

This matter presents a billing dispute between two telecommunications companies. On September 23, 2014, Peerless Network, Inc. and its subsidiaries[1] brought suit to recover amounts allegedly owed by Verizon[2] for

[1] Peerless's wholly owned subsidiaries include Peerless Network of Arkansas, LLC, Peerless Network of Arizona, LLC, Peerless Network of California, LLC, Peerless Network of Colorado, LLC, Peerless Network of Connecticut, LLC, Peerless Network of Delaware, LLC, Peerless Network of the District of Columbia LLC, Peerless Network of Florida, LLC, Peerless Network of Georgia, LLC, Peerless Network of Illinois, LLC, Peerless Network of Indiana, LLC, Peerless Network of Kansas, LLC, Peerless Network of Kentucky, LLC, Peerless Network of Louisiana, LLC, Peerless Network of Maine, LLC, Peerless Network of Maryland, LLC, Peerless Network of Massachusetts, LLC, Peerless Network of Michigan, LLC, Peerless Network of Minnesota, LLC, Peerless Network of Missouri, LLC, Peerless Network of Nevada, LLC, Peerless Network of New Hampshire, LLC, Peerless Network of New Jersey, LLC, Peerless Network of New York, LLC, Peerless Network of North Carolina, LLC, Peerless Network of Ohio, LLC, Peerless Network of Oklahoma, LLC, Peerless Network of Oregon, LLC, Peerless Network of Pennsylvania, LLC, Peerless Network of Rhode Island, LLC, Peerless Network of South Carolina, LLC, Peerless Network of Tennessee, LLC, Peerless Network of Texas, LLC, Peerless Network of Utah, LLC, Peerless Network of Vermont, LLC,

telephone exchange traffic [*6] that Verizon either delivered to or received from Peerless's network beginning sometime in 2008. Verizon admits it has withheld payment on portions of Peerless's invoices, but denies Peerless is entitled to collect the full amounts billed. Currently before the Court are the parties' cross-motions for partial summary judgment. R. 159; R. 170. For the reasons that follow, both motions are denied in part and granted in part.

BACKGROUND[3]

A. OVERVIEW OF TELEPHONE EXCHANGE SERVICES

As a general matter, telephone exchange services[4] in the United States are divided into two service categories based on the distance of a call: (1) local exchange services, which involve calls that originate (*i.e.*, begin with a calling party) in one exchange service area[5] and terminate (*i.e.*, end to a called party) in the same exchange service area; and (2) interexchange services, which involve calls that originate in one exchange area and terminate in a different exchange area.[6] Interexchange services provide the "middle portion" of calls crossing local exchange area boundaries, and can be either intrastate (*i.e.*, calls that are exchanged within the same state) or interstate (*i.e.*, calls that are exchanged [*7] over state boundary lines). In common parlance, local exchange services may be referred to as "local calling" or "local service," and interexchange services may be referred to as "long distance calling" or "long distance service," though these terms are imprecise.

In 1996, Congress adopted the Telecommunications Act of 1996, codified at various provisions in 47 U.S.C. §§ 153 *et seq.* (the "1996 Act"). The 1996 Act requires all telecommunications carriers to interconnect their networks "directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). Interconnection ensures that consumers can place calls to and receive calls from consumers served by a different telecommunications carrier.[7] Historically, the Federal Communications Commission ("FCC") has exercised

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Peerless Network of Virginia, LLC, Peerless Network of Washington, LLC, and Peerless Network of Wisconsin, LLC (collectively, "Peerless").

[2] Defendants include MCI Communications Services, Inc., Verizon Services Corp., and Verizon Select Services Inc. (collectively "Verizon").

[3] The information in this background section comes from a variety of sources, including the allegations of the complaint that are admitted in Verizon's answer or in response to Peerless's Statement of Facts or denied on a basis not proper under the Federal Rules of Civil Procedure and therefore deemed admitted. In addition, the Court considered relevant facts from the parties' Joint Stipulation of Undisputed Facts ("JSOF"), R. 155, and additional facts in the parties' separately filed fact statements that are properly presented and undisputed, which the Court identified after taking into consideration Peerless's two motions to strike, R. 168, 188, and Verizon's responses thereto, R. 180, 191. Finally, large portions of the overview and historical sections are taken directly without further citation from the exhaustive opinions in *CallerID4u, Inc. v. MCI Commc'ns Servs.*, 880 F.3d 1048, 2018 WL 493161 (9th Cir. Jan. 22, 2018), and *Great Lakes Commc'ns Corp. v. AT&T Corp.*, 2015 U.S. Dist. LEXIS 25402, 2015 WL 897976 (N.D. Iowa Mar. 3, 2015). For additional history of the FCC's regulation of telephone exchange services, the Court references those decisions.

[4] "The term 'telephone exchange service' means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(54).

[5] An exchange service area is a "[g]eographic area in which telephone services and prices are the same." R. 73 at 6 n.1.

[6] *See* 47 U.S.C. § 153(28) (definition of "interstate communication").

[7] *See* 47 U.S.C. § 153(20) ("The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.").

jurisdiction over interstate calls, while each individual state's public service commission has exercised jurisdiction over intrastate calls.

To enable carriers to exchange calls between their customers, the FCC has adopted a compensation structure which requires local exchange service companies ("LECs") to allow interstate exchange service companies ("IXCs") to use their telephone lines to originate and terminate [*8] interexchange service telephone calls.[8] Thus, when a consumer makes an interexchange call, the consumer's LEC originates the call, performs switching functions and delivers the call (*i.e.*, "hands the call off") to an IXC, and the IXC then hands the call off to the terminating LEC so that the call can be delivered to the called party. A common example of this would be a long-distance call from Chicago to St. Louis. In that example, AT&T Illinois (the incumbent[9] LEC in Chicago) performs transport and switching functions and originates the call on its network, and hands the call over to an IXC, such as Sprint Long-Distance, which carries the call to St. Louis. Sprint then hands the call off to AT&T Missouri (the incumbent LEC in St. Louis), which performs switching functions and delivers the call to the called party. While the process sounds cumbersome, in practice it happens in fractions of seconds.

To compensate LECs for use of their networks, IXCs are required to pay "access service charges," also known as "switched exchange access services,"[10] for originating and terminating interexchange telephone calls and for the transport of these calls. These access service charges are set forth [*9] either in negotiated agreements between the LECs and IXCs, or in regulated terms of service and price lists—known as tariffs—filed either with a state public service commission for calls originating and terminating within each state, or with the FCC for calls originating and terminating across state lines.

B. Brief History of FCC Regulation of Telephone Exchange Services

Until the 1970s, AT&T and its subsidiaries maintained a virtual monopoly over interstate wire telephone services, including both long distance and local wire telephone services. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). AT&T provided long-distance services to consumers, while the Bell operating companies, twenty-two local telephone companies wholly owned by AT&T, provided local services to consumers. *See Access Charge Reform Price Cap Order*,[11] 12 FCC Rcd. at 15991. Beginning in the 1970s, new IXCs began entering the long-distance market to compete with AT&T. But because AT&T controlled the Bell operating companies, AT&T could freeze out competition by having its LECs charge higher prices to competing IXCs. *Id.* The federal government challenged these activities in an antitrust lawsuit against AT&T, which resulted in

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[8] *See* 47 U.S.C. § 259 (requiring the FCC to prescribe regulations that require local exchange carriers "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e) of this title").

[9] An "incumbent" LEC typically means the Bell operating company that provided local exchange service in a certain area prior to the government break-up of AT&T and its local operating subsidiaries. *See* 47 U.S.C. § 251(h)(1).

[10] *See* 47 C.F.R. § 61.26(a)(3) ("Switched exchange access services shall include: (i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching; (ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.").

[11] *In the Matter of Access Charge Reform Price Cap Performance Review for Local Exch. Carriers Transp. Rate Structure & Pricing End User Common Line Charges*, 12 F.C.C. Rcd. 15982 (1997).

AT&T agreeing to divest itself of all twenty-two Bell operating companies. *Id.* The former Bell [*10] LECs are now known as incumbent LECs, or ILECs. *Id.*

After the break-up of AT&T, consumers, specifically the caller and the call recipient, were able to choose their LECs. In doing so, they pay the LECs' charges for local telephone services, but they do not pay the LEC for the switched access services that the LEC provides to the IXC to complete the call. Rather, the IXC must pay those charges. Although the divestiture ended AT&T's anticompetitive control over the ILECs, the ILECs themselves had few competitors, and could use their local monopoly power to charge the IXCs unreasonable and discriminatory switched access rates. To avoid this problem, the FCC began regulating ILEC rates by requiring ILECs to file and maintain tariffs with the FCC for interstate switched access services.

After years of experimenting with permissive detariffing of both ILECs and CLECs[12] the FCC determined that some CLECs were taking advantage of the system by filing tariffs setting unreasonably high switched access rates that were "subject neither to negotiation nor to regulation designed to ensure their reasonableness." *In re Access Charge Reform*, 16 F.C.C. Rcd. 9923 at ¶ 2 (2001). As it turned out, CLECs, like ILECs, were generally "insulated from the effects [*11] of competition," because the caller and call recipient who choose their LECs (but do not pay for terminating switched access services) have "no incentive to select an [LEC] with low rates." *Id.* at ¶ 28. Under this framework, the IXCs had to pay whatever rate was set by the CLECs in their tariffs in order to provide phone service to their customers, because the customers that actually choose the terminating CLEC do not also pay their access charges and have no incentive to select CLECs with low rates. *Id.* The CLECs therefore could impose rates far higher than the ILECs (whose rates were regulated), with no risk that those high rates would drive away the CLECs' individual customers. *See Developing a Unified Intercarrier Comp. Regime*, 16 FCC Rcd. 9610 at ¶ 133 (2001).

In response to this regulatory arbitrage opportunity, the FCC issued the *Access Reform Order* in 2001, revising its CLEC tariffing system and conducting a new forbearance analysis. *In re Access Charge Reform*, 16 F.C.C. Rcd. 9923 (2001). In this order, the FCC first established a "benchmark" level for CLEC rates based on the rates charged by the ILEC or ILECs operating in a CLEC's service area. *In re Access Charge Reform*, 16 F.C.C. Rcd. at 9941. A CLECs' tariffed rates would be "presumed to be just and reasonable" as long as they did not exceed the benchmark rate. *Id.* at 9938. Second, the FCC revised [*12] its decision in the *Hyperion Order*;[13] rather than give CLECs free rein to choose whether to file tariffs, the FCC decided to exercise its forbearance authority "only for those CLEC interstate access services for which the aggregate charges exceed our benchmark" by requiring CLECs that sought to charge rates above the benchmark to negotiate agreements with IXCs. *In re Access Charge Reform*, 16 F.C.C. Rcd. at 9957.

As a result of the *Access Reform Order*,

> [t]here are two means by which a CLEC can provide an IXC with, and charge for, interstate access services. First, a CLEC may tariff interstate access charges if its rates are no higher than the rates charged for such services by the competing ILEC (the benchmark rule). If a CLEC provides only a "portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC," its rate must "not exceed the rate charged by the competing ILEC for the same access services."[14] . . . Second, as an

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[12] A CLEC is a "local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of 'incumbent local exchange carrier.'" 47 C.F.R. § 61.26(a)(1).

[13] *Hyperion Telecomms., Inc. Petition Requesting Forbearance*, 12 FCC Rcd. 8596 (1997).

[14] *See* 47 C.F.R. § 61.26(c) ("The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate."). The FCC exempted "a narrow class of rural CLECs from its benchmark rule, . . . permitting qualifying carriers to file tariffs containing rates "at the level of those in the NECA [National Exchange Carrier Association] access tariff." *In re AT&T Servs. Inc.*, 30 F.C.C. Rcd. at 2588.

> alternative to tariffing, a CLEC may negotiate and enter into an agreement with an IXC to charge rates higher than those permitted under the benchmark rule.

In re AT&T Servs. Inc., 30 F.C.C. Rcd. 2586, 2588-89 (2015), *review denied in part, cause remanded by Great Lakes Comnet, Inc. v. Fed. Commc'ns Comm'n*, 823 F.3d 998, 422 U.S. App. D.C. 396 (D.C. Cir. 2016).

C. The Present Case

With two exceptions, the Peerless subsidiaries are [*13] CLECs,[15] while Verizon is an IXC that provides telephone services nationwide.[16] *See* R. 155, JSOF, ¶¶ 3, 4. Peerless seeks compensation for unpaid access charge rate elements and related services beginning in 2008. Specifically, Peerless seeks payment of billed charges for switched access services, both originating and terminating, provided to Verizon at an "end office" and at a "tandem."[17] *Id.*, JSOF, ¶ 7.

1. 2008-2014 BILLING DISPUTES

Originally, Peerless billed Verizon access service charges pursuant to its tariffed rates. But in 2009, Peerless made a sales pitch to Verizon that Peerless would beat the tandem switching rates offered by AT&T, the company from which Verizon had been purchasing those services. R. 236-2, Resp. to Verizon Statement of Facts ("VSOF"), ¶ 2 (admitted). To this end, in February 2009, Verizon and Peerless entered into the Tandem Service Agreement under which Peerless agreed to provide Verizon tandem switching services at rates that were lower than Peerless's tariffed rates. *Id.*, Resp. to VSOF, ¶ 4 (admitted). In addition, Peerless agreed to amend the contractual rates "such that the rates remain lower than the prevailing ILEC level in the event ILEC rates [*14] are lowered." *Id.*, Resp. to VSOF, ¶ 3.

In 2013, "the relationship between Peerless and Verizon broke down because Verizon disputed its bills from Peerless for switched access charges and Peerless alleged Verizon wrongfully disputed its billings." *See* R. 69 at 4 (*Peerless Network, Inc. v. MCI Commun. Servs.*, 2015 U.S. Dist. LEXIS 66822, 2015 WL 2455128, at *2 (N.D. Ill. May 21, 2015)). Verizon internally decided that Peerless was engaged in a practice Verizon calls "traffic pumping,"[18] which artificially inflated Peerless's access charges. As a result, Verizon began withholding full payment for Peerless's services. According to Peerless, Verizon "implemented a plan to withhold full payment . . . all while not challenging Peerless's rates with the FCC or state commissions," and, beginning in 2014, "stopped paying for Peerless's switched access services altogether." R. 236-1, Peerless Statement of Facts ("PSOF"), ¶¶ 17-18 (citations omitted). Verizon, on the other hand, asserts that it stopped paying Peerless's tariffed charges after

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[15] The parent company, Peerless Network, Inc., is not itself a CLEC. *See* R. 155, JSOF, ¶ 2. The two exceptions among Peerless's subsidiaries that apparently are not CLECs are Peerless Network of Louisiana, LLC (which is a certified Competitive Access Provider) and Peerless Network of Maine, LLC. *Id.* at ¶ 3. Although the parties discuss and dispute the relevance of the fact that Peerless Network, Inc. is not a CLEC, neither have made any argument concerning the relevance, if any, of the fact that two subsidiaries are not CLECs. Further, the Court notes that Peerless "admitted" in its answer that "each of [Peerless's] subsidiaries is certified by the relevant state public utility commission as a competitive local exchange carrier." R. 77, Peerless Answer, ¶ 6.

[16] More specifically, MCI Communications Services, Inc. provides long distance services as an IXC, while Verizon Select Services, Inc. is a telecommunications carrier that provides long-distance telephone services and Verizon Services Corporation is a management company that provides centralized administrative services to Verizon companies. R. 155, JSOF, ¶ 4.

[17] Generally, tandem charges are incurred for connecting and routing telephone traffic between end office switches, *see, e.g. AT&T Corp. v. Beehive Tel. Co.*, 2010 U.S. Dist. LEXIS 5804, *6 (D. Ut. Jan. 26, 2010), and end office charges are incurred for the functions of processing and exchanging calls to subscribers, *In the Matter of Connect America Fund*, 30 FCC Rcd 1587, 1600-1603 ¶¶ 26-31 (rel. Feb. 11, 2015) ("Declaratory Ruling").

[18] Verizon refers to the practice as "traffic pumping," but the Court will use the FCC's term of "access stimulation."

determining, *inter alia*, that Peerless was billing for services it was not providing and was engaging in access stimulation without complying with the FCC's access stimulation rules. R. 162-1, VSOF, ¶ 10. Further, Verizon rejects any contention that it has failed to pay "all" end [*15] office and tandem charges, stating that, since January 2012, it has paid Peerless more than $24.9 million in switched access charges (not counting Verizon's additional payments to Peerless for other types of telecommunications services not at issue in this litigation).

On September 18, 2013, in an effort to postpone litigation, Peerless and Verizon entered into a Standstill Agreement. *See* R. 155, JSOF, ¶ 62. Section 2(b) of that Agreement provides that:

> Peerless may continue to bill Verizon for certain intercarrier compensation charges that it contends in good faith apply to services rendered by Peerless to Verizon (the "Peerless New Charges,"), and Verizon shall pay any such charges that are not subject to a good faith dispute, but Verizon may dispute and withhold payment of any such charges as to which Verizon brings a good faith dispute. Verizon shall state with specificity the basis of any good faith dispute (*e.g.* that the charges do not apply given the nature of the jurisdiction, that the call detail records do not support the charge or that the charges are inconsistent with law).

R. 236-2, Resp. to VSOF, ¶ 7 (admitted).

While the Standstill Agreement may have postponed litigation, it did not [*16] resolve the parties' disagreements. Apparently in response to Verizon's continued withholding of payment on billed charges, Peerless notified Verizon in July 2014 that, "effective immediately," it was replacing the contractual tandem switched access rates with its higher tariff rates.[19] The federal tariffs at issue include Peerless's FCC Tariff No. 3, in effect from May 2011 to September 2013, and FCC Tariff No. 4, initially filed with the FCC on September 13, 2013, with an effective date of September 28, 2013, and amended in July 2014, July 2015, November 2015, and July 2016 (collectively hereinafter "the Tariff").[20] After Peerless cancelled the lower rates in the Tandem Services Agreement, Peerless asserts that Verizon's payments to it dropped even further, with Verizon withholding additional amounts on even undisputed charges as a way of recouping previous charges paid by Verizon but which Verizon now sought to dispute. As of the summary judgment filings, Peerless alleges that Verizon owed it $256,563.44 under the Tandem Services Agreement, and $34,301,674.49 in combined federal and state tariffs. R.236-1, PSOF, ¶¶ 26, 30.

2. This Lawsuit

Not surprisingly, the history of this [*17] litigation has been marked by as much confrontation and brinksmanship as the parties' relationship outside this litigation. Peerless filed the original complaint over three years ago on September 23, 2014, alleging twelve causes of action arising out of Verizon's withholding of payments on Peerless's invoices. R. 1, Compl. Shortly thereafter, Peerless filed a motion to stay one count in the complaint, which dealt with Peerless's originating end office switched access service charges for calls destined to Verizon's customers that subscribe to Verizon's 8YY services.[21] Peerless sought to stay that count because it concerned access charges where VoIP (voice-over-internet-protocol) technology is used to place the call, and issues related to VoIP technology were then pending before the FCC. R. 32. Not long afterwards, the FCC ruled in favor of Peerless's position on the VoIP/8YY issue in the *Declaratory Ruling*,[22] and, as a result, on February 12, 2015, Peerless withdrew its motion to stay. In 2016, however, the FCC's order was vacated by the D.C. Circuit Court of Appeals, affecting issues related to the parties' summary judgment briefings. *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016).

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[19] R. 236-2, Resp. to VSOF, ¶¶ 5-6 ("Peerless did not cancel the Tandem Service Agreement; it terminated the contract rates which then defaulted the tandem rates under the agreement to the tariff."); R. 178-1, Resp. to PSOF, ¶¶ 24-25.

[20] *See* R. 178-1, Resp. to PSOF, ¶¶ 32-33, 36; *see also* R. 155, JSOF, ¶¶ 11-12. 12

[21] "8YY" calls are toll-free 1-800 calls. R. 73, Am. Compl., ¶ 1; *see also Teliax, Inc. v. AT&T Corp.*, 2017 U.S. Dist. LEXIS 141470, 2017 WL 3839459, at *1 (D. Colo. Sept. 1, 2017).

[22] *In re Connect America Fund*, 30 FCC Rcd. 1587 (2015) (hereinafter "Declaratory Ruling").

Verizon responded to the complaint by filing [*18] a partial motion to dismiss. After the Court granted in part and denied in part Verizon's partial motion to dismiss, R. 69, Peerless filed the operative amended complaint. *See* R. 73; *see also* R. 76, Supp. to Am. Complaint. The amended complaint asserts the following eight claims against Verizon:

Count I—Breach of the Tandem Services Agreement with respect to interstate access services;
Count II—Breach of the Tandem Services Agreement with respect to intrastate access services;
Count III—Collection action pursuant to Peerless's federal tariffs;
Count IV—Collection action pursuant to Peerless's federal tariffs for 8YY calls;
Count V—Collection action pursuant to Peerless's state tariffs;
[Counts VI through IX were dismissed with prejudice pursuant to the Court's May 21, 2015 Order]
Count X—Breach of the parties' Standstill Agreement;
Count XI—Declaratory relief with respect to interstate switched access services; and
Count XII—Declaratory relief with respect to intrastate switched access services.

In response to the amended complaint, Verizon alleged Peerless's claims were barred in whole or in part by four affirmative defenses: (1) the filed rate doctrine; (2) the applicable statute of limitations; [*19] (3) the doctrines of laches, estoppel, and unclean hands; and (4) the doctrine of recoupment. R. 75 at 28. Verizon also alleged the following counterclaims by which it sought to recover charges previously paid by it:

Counterclaim One: Breach of Federal Tariff;
Counterclaim Two: Breach of State Tariffs;
Counterclaim Three: Declaratory Judgment—Breach of Federal Tariff; and
Counterclaim Four: Declaratory Judgment—Breach of State Tariffs.

R. 75 at 34-36.

On July 31, 2015, Peerless filed a new federal tariff. Even though Peerless maintained that it was not and never had been engaged in access stimulation, as Verizon asserted, Peerless claimed that its newly filed tariff met the requirements for access charges stemming from access stimulation activities, and thus that Verizon had no good faith basis for continuing to withhold payments under the new tariff. Based on this premise, and in an effort to put a stop to Verizon's withholding of payments on at least some of Peerless's switched access charges, on December 15, 2015, Peerless filed a motion for preliminary injunction. *See* R. 96. Peerless's motion sought to require Verizon to pay certain categories of switched access charges going forward [*20] based on the new Tariff, which Peerless contended satisfied even Verizon's view of what those charges should be.

An injunction hearing was held beginning on February 11, 2016, *see* R. 118. The Court heard two full days of testimony and received hundreds of pages of documents into evidence. At the end of the second day, the Court questioned Verizon on why it was disputing Peerless's interpretation of certain FCC orders when it appeared from the testimony presented at the hearing that, if Peerless had used Verizon's interpretation instead, it would have charged Verizon more, not less, than what Peerless in fact charged. *See* R. 127, Prel. Inj. Hrg. Tr., Feb. 12, 2016, 259:23-260:1 (Court: "I hope we're not fighting about [Peerless] being wrong, but the result of their error resulted in lower charges to [Verizon], and [Verizon is] not paying [simply] because [Peerless] is wrong, because that is senseless.").[23] It was unclear at the time whether Verizon conceded that was the case,[24] and the injunction hearing was continued without resolution of that question. At the continued hearing date, the parties informed the Court that an agreement had been reached to resolve Peerless's preliminary injunction [*21] motion.

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[23] *See* R. 172-7, Decl. of Patrick Phipps, at 2 ("[F]ollowing Peerless's July 2015 tariff filing (which modified Peerless's interstate switched access rates to mirror those of the LPCL in each state), Peerless billed the relevant Verizon defendant interexchange carriers ("IXCs") less for interstate switched access services than Peerless would have billed to those same Verizon IXCs if Peerless would have mirrored the interstate switched access rates of the price cap local exchange carriers who Verizon claims are the lowest price cap LECs").

[24] Verizon appears to take the position that the issue is not before the Court because "Peerless did not further amend its amended complaint to include charges billed under the new tariff, nor was the new tariff a significant subject of discovery between the parties." R. 162 at 10.

On August 10, 2016, Verizon filed its motion for partial summary judgment, R. 159. On August 31, 2016, Peerless filed its cross-motion for partial summary judgment and combined response in opposition to Verizon's motion for partial summary judgment. R. 170.[25] The parties filed supplemental briefs after the D.C. Circuit vacated the *Declaratory Ruling*[26] (R. 207 and R. 208) and various supplemental authority discussing cases decided by other courts on issues relevant here. ***See*** R. 199, 222, 228, 238.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); ***see also Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court considers the entire evidentiary record and must view all of the evidence and draw all reasonable inferences from that evidence in the light most favorable to the nonmovant. ***Ball v. Kotter***, 723 F.3d 813, 821 (7th Cir. 2013). To defeat summary judgment, a nonmovant must produce more than "a mere scintilla of evidence" and come forward with "specific facts showing that there is a genuine issue for trial." ***Harris N.A. v. Hershey***, 711 F.3d 794, 798 (7th Cir. 2013). Ultimately, summary judgment is warranted only if a reasonable jury could not return a verdict for the nonmovant. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

DISCUSSION [*22]

Peerless alleges that Verizon's refusal to comply with the terms of the Tandem Services Agreement and Peerless's federal and state tariffs is unlawful and on-going, that Verizon refuses to pay for access services despite continuing to receive those services from Peerless, and that Peerless has an obligation under the law to prevent telephone users' service disruptions by continuing to provide those services to Verizon even though Verizon refuses to pay Peerless's charges for them. It is undisputed that Verizon delivered the traffic at issue to Peerless's network, that, in return, Peerless delivered switched access and related services to Verizon, and that Peerless invoiced Verizon for those services. It also is undisputed that Verizon has withheld payment on disputed portions of those invoices, as well as set off against undisputed portions previously paid amounts that Verizon did not dispute when it paid them but now wants to dispute. ***See*** R. 178-1, Resp. to PSOF, ¶ 49 (admitting that Verizon deducted amounts from current bills to recoup previous amounts that Peerless unlawfully collected from Verizon).

Peerless moves for summary judgment on its claims to collect under the Tandem Services [*23] Agreement and its federal and state tariffs, and seeks a declaration as to its right to recover under those tariffs. Verizon, on the other hand, moves for summary judgment on Peerless's collection and declaratory judgment claims, as well as on Verizon's counterclaims seeking to recover amounts Peerless already has collected and retained pursuant to its tariffs. According to Verizon, Peerless is not entitled to recover under its tariffs for three reasons. First, Verizon argues Peerless's tariffs are unlawful because they fail to comply with the FCC's regulations concerning "access stimulation." This is also the basis of Verizon's counterclaims. Second, Verizon argues Peerless has billed its tariffed end office switched access rate for calls that it routes over the public Internet, but routing such calls is not end office switching. Third, some of Peerless's customers offer international calling card services, which require a pre-paid calling card and the dialing of a number to reach the international destination. Verizon argues that because the calls terminate internationally, Peerless cannot charge for terminating switched access services it provides for these calls.

The Court will [*24] first address Verizon's arguments against Peerless's collection actions and then proceed to the remaining issues. Virtually all of the summary judgment briefing focuses on Verizon's access stimulation

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[25] Peerless later filed an Amended Memorandum of Law in Support of Its Motion for Partial Summary Judgment, R. 236, which the Court cites throughout this opinion.

[26] *In the Matter of Connect Am. Fund*, 30 F.C.C. Rcd. 1587 (2015) (hereinafter "Declaratory Ruling").

arguments, and therefore the Court will do the same here. The parties will be permitted to file a supplemental statement regarding the state tariffs following the entry of this order.[27]

I. VERIZON'S ACCESS STIMULATION ARGUMENT

Verizon argues that Peerless cannot collect on its Tariff because it violates FCC regulations governing a practice known as access stimulation. According to the FCC:

> Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and "free" conference calls. The arrangement inflates or stimulates the access minutes [*25] terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the "free" service provider, or offers some other benefit to the "free" service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering. Meanwhile, the wireless and . . . IXCs[] paying the increased access charges are forced to recover these costs from all their customers, even though many of those customers do not use the services stimulating the access demand.

Connect America Fund, 26 F.C.C. Rcd. 17663, ¶ 656.[28]

Because access stimulation can lead to inflated profits for the LEC, *id.*, ¶ 657, in 2011 the FCC sought to limit and regulate the practice with a second benchmark rule. Under the access stimulation benchmark, an LEC engaging in access stimulation [*26] must "reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates." *Id.* This rule is codified in 47 C.F.R. § 61.26(g), which provides that:

> (1) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.
>
> (2) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(bbb).

47 C.F.R. § 61.26(g). Verizon argues that the undisputed facts show Peerless has been engaged in access stimulation since January 2012, but did not file tariffs that comply with § 61.26(g) until July 2015.

To decide whether Peerless has in fact been engaged in access stimulation, the Court must consult the FCC regulations. Those regulations provide that an LEC engages in access stimulation if it has entered into an [*27] "access revenue sharing agreement," which is defined at 47 C.F.R. § 61.3(bbb)(1)(i). In addition, for a CLEC to be considered an access stimulator, it must meet one of two possible tests: either (a) it has "an interstate terminating-

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[27] Verizon argues that Peerless's state tariffs are invalid based on its federal access stimulation arguments. R. 178 at 4 n. 5. However, the FCC explained that states retain regulatory authority over state tariff regulations. *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- In re Connect Am. Fund*, 26 F.C.C. Rcd. 17663 ¶ 790 (2011) ("States...will continue to oversee the tariffing of intrastate rate reductions during the transition period"); *see also In re Qwest Commc'ns Corp.*, dkt. FCU-2007-0002, Order Initiating Refund Proceedings and Requesting Responses, 2013 WL 3778429 (Ia. Util. Bd. Jul. 16, 2013) (examining access stimulation under its own complaint procedures). Further, Verizon has not raised any state-specific access stimulation claims.

[28] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform—Mobility Fund*, 26 F.C.C. Rcd. 17663 (2011) (hereinafter "*Connect America Fund*").

to-originating traffic ratio of at least 3:1 in a calendar month,"; or (b) it has "more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year." *Id.*, § 61.3(bbb)(1)(ii).

The Court finds that Verizon is not entitled to summary judgment on its access stimulation argument because that issue depends on the resolution of numerous interpretative questions concerning, among others, the FCC's definition of an "access revenue sharing agreement," and the proper methodology for identifying the benchmark rate of the "price cap LEC with the lowest switched access rates in the state." *See* 47 C.F.R. § 61.26(g)(1); *see also* R. 162 at 17-18; R. 236 at 10, 12. The parties present dueling evidence on these issues.[29] It is clear from the record that guidance is needed from the agency that devised the access stimulation rule as to how to interpret and apply that rule. Verizon recognizes as much when it argues that, in the alternative to resolving [*28] the issues raised in its summary judgment motion, the Court should refer those issues to the FCC under the primary jurisdiction doctrine. *See* R. 178 at 30-31.

Primary jurisdiction is a permissive doctrine that applies when resolving a claim requires administrative expertise. *See United States ex rel. Sheet Metal Workers Int'l Ass'n, Local Union 20 v. Horning Invests., LLC*, 828 F.3d 587, 592 (7th Cir. 2016); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996) ("courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency"). "In such cases, a federal court may stay the proceeding to allow the agency to take the first look at the case." *Horning Invests*, 828 F.3d at 592. Rulings on whether Peerless has been engaged in access stimulation, and, if so, whether its Tariff does not exceed the benchmark, which in turn raises issues of methodology for identifying the benchmark rate of the price cap LEC with the lowest switched access rates in the state, are within the FCC's primary jurisdiction. *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 719-20 (7th Cir. 2014) ("'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the [*29] judicial process is suspended pending referral of such issues to the administrative body for its views.") (quoting *United States v. Western P. R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956)).

"That description of the doctrine fits this case to a T." *Id.* at 720. The FCC first set forth the access stimulation rules in *Connect America Fund*. Here, Peerless contends that it complied with the rules established by the FCC by filing the Tariff, while Verizon claims that Peerless's Tariff rates are too high. The parties disagree on several key definitional issues, which determine how to calculate the appropriate access stimulator benchmark rate, as well as how to determine whether a CLEC is an access stimulator required to set its prices at or below that benchmark. *Connect America Fund* does not speak specifically to those definitional issues. In short, the interests of agency expertise, consistency, and uniformity compel a finding that the FCC has primary jurisdiction over Verizon's claims that (1) Peerless is or was engaged in access stimulation, and (2) if Peerless was so engaged, that its switched access rates are or were not properly benchmarked as required by *Connect America Fund. See, e.g., Teliax, Inc. v. AT&T Corp.*, 2017 U.S. Dist. LEXIS 141470, 2017 WL 3839459, at *2-3 (D. Colo. Sept. 1, 2017) (transferring case to FCC under the doctrine of primary jurisdiction because "[a]lthough [*30] it perhaps goes without saying, judges with no technical background in telecommunications are ill-prepared when compared to the FCC to decide [certain technical issues]"); *Great Lakes Commun. Corp. v. AT&T Corp.*, 2014 U.S. Dist. LEXIS 85597, 2014 WL 2866474, at *14 (N.D. Iowa June 24, 2014) (Report and Recommendation) (holding that AT&T's claims that the CLEC's interstate switched access rates were so high as to be unjust and unreasonable, "present[] a textbook scenario for invoking primary jurisdiction"), *aff'd*, 2015 U.S. Dist. LEXIS 25402, 2015 WL 897976, *6 (N.D. Iowa Mar. 3, 2015).

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[29] *See, e.g.*, R. 162-1, VSOF, ¶ 45 ("The lowest price cap incumbent LEC in each state, as calculated based on the tariffed terminating end office switching rate elements, is set forth in the Traffic Pumping Rate Determination that Verizon provided to Peerless during discovery."); R. 236-2, Resp. to VSOF, ¶ 45 ("DENIED. The methodology used by Verizon to create that list is not the proper methodology to make that determination as it does not take into account Peerless's mix of traffic....Verizon's methodology fails to account these differences in the quantity of minutes."); *Id.*, ¶ 46 (citing to expert testimony to dispute methodology used by Verizon in determining whether Peerless's tariffs were required to benchmark to the lowest price cap incumbent LEC).

II. Verizon's VoIP Argument

Verizon's second argument against Peerless's Tariff collection action is that Peerless cannot collect on its tariffs involving Voice-over-Internet-Protocol ("VoIP"). Specifically, Verizon argued that Peerless cannot collect charges on calls provided with a VoIP partner unless Peerless assigned the telephone to the calling party. Following summary judgment briefing, however, the D.C. Circuit vacated and remanded a FCC ruling. As explained in more detail below, the vacatur of the ruling allowed Verizon to also argue that CLECs like Peerless cannot charge for terminating switched access charges at all when partnering with a VoIP provider.

"VoIP is a newer technology that delivers telephone calls by splitting data into tiny packets traveling the most efficient pathways [*31] available, rather than the traditional format, which transmits data over a single pathway." *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 861 F.3d 566, 568-69 (5th Cir. 2017). "There are two types of VoIP providers—"facilities based" providers, which typically provide the last-mile facility that connects the end user to the end office switch (*e.g.* Comcast), and "over the top" (OTT) providers that do not provide the last-mile facility to the end user (*e.g.* Vonage). R. 172 at 34-35. According to Verizon, the FCC has a "long-standing policy" under which a LEC "should charge only for those services that they provide." R. 162 at 22.

But, starting with the *Connect America Fund*, the FCC departed from this "long-standing" principle by clarifying carrier compensation requirements for newer VoIP technology:

> When multiple providers [i.e., a wholesale LEC or its retail VoIP partner] jointly provided access, the Commission was concerned that, for example, permitting a single competitive LEC to impose via tariff all the same charges as an incumbent LEC, regardless of the functions that competitive LEC performs, could result in double billing. In light of the policy considerations implicated here, we adopt a different approach to address concerns about double billing. As discussed [*32] above, we believe that a symmetrical approach to VoIP-PSTN intercarrier compensation is the best policy, and thus believe that competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances.

26 F.C.C. Rcd. 17663, ¶ 970. The FCC codified this principle in what is now known as the "VoIP symmetry rule." The VoIP symmetry rule states that an LEC can assess and collect full access charges, "regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnection VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36)." 47 C.F.R. 51.913(b).

The rule has limitations. For example, an LEC cannot "charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service." *Id.* In addition, the FCC amended 47 C.F.R. § 61.26(f), which is the tariffing provision intended to implement the VoIP symmetry rule, to allow CLECs to assess rates for access services based on the [*33] portion of the service provided. Those services include end office access services provided as the "functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier." 47 C.F.R. § 51.903(d)(3). In *Connect America Fund*, the FCC recognized that LECs partnered with VoIP providers to supply end office access services. It specified that a LEC could collect for access services "regardless of whether the [LEC] itself delivers such traffic to the called party's premises or delivers the call ... via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service."[30] In short, *Connect America Fund* allowed a VoIP provider and its LEC partner (collectively, "VoIP-LEC") to charge for providing the "functional equivalent" of end-office switching services. In the *Declaratory Ruling*, the FCC upheld *Connect America Fund*, ruling that such services are end-office access under subsection (3) of § 51.903(d). *Declaratory Ruling* at 1588-89, ¶ 3.

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[30] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. [*34] on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 F.C.C. Rcd. 17663 at 388 (2011).

AT&T challenged the *Declaratory Ruling*. The D.C. Circuit held that the FCC had not explained what the phrase "functionally equivalent" meant "with the requisite clarity to enable [the court] to sustain [the] conclusion" that the services that LECs like Peerless provide are the "functional equivalent" of end-office switching. *AT&T Corp. v. FCC*, 841 F.3d 1047, 1049 (D.C. Cir. 2016) (vacating *Declaratory Ruling*, 30 FCC Rcd. 1587 (2015)) ("AT&T Order"). The D.C. Circuit vacated the *Declaratory Ruling* and remanded to the FCC the issue of what services, if any, provided by over-the-top VoIP-LEC providers constitute the "functional equivalent" of end-office switching.

Both parties submitted supplemental briefs on the effect of the AT&T Order. R. 207, 208. Verizon argues that the AT&T Order brings into question whether Peerless and its VoIP partner perform the functional equivalent of end-office switching, meaning Peerless could not charge for those services under its tariff pursuant to the VoIP Symmetry Rule. R. 207. Peerless argues the AT&T Order had very little effect on the VoIP Symmetry Rule. Peerless says the AT&T Order merely vacated the *Declaratory Ruling* that interpreted the rule, without affecting the rule itself.

[*35] Like the access stimulation issues, the Court finds it appropriate to refer the VoIP issue to the FCC. The *Teliax* court referred an identical issue to the FCC because, "[a]lthough it perhaps goes without saying, judges with no technical background in telecommunications are ill-prepared when compared to the FCC to decide what services if any performed by over-the-top VoIP-LEC providers constitute the 'functional equivalent' of the end-office switching. Furthermore, it is quite clear that the FCC desires uniformity with respect to this issue as its previous attempt to do so through the *[Declaratory Ruling]* evidences." *See, e.g., Teliax, Inc. v. AT&T Corp.*, 2017 U.S. Dist. LEXIS 141470, 2017 WL 3839459, at *2-3 (D. Colo. Sept. 1, 2017). Peerless argues against referral because of the procedural posture of this case—specifically that the case has been pending for a number of years and that referral to the FCC will further delay payment on its long overdue collection action.[31] But the Court finds referral appropriate in light of the *Teliax* court's recent referral, the technical nature of these issues, and the need to ensure uniformity. And, in light of the Court's decision later in this opinion granting Peerless's collection action, the Court finds that Peerless will not be prejudiced by referral to the FCC.

Because the *Declaratory Ruling* was in effect during the parties' initial briefing, Verizon did not make an argument regarding this issue on summary judgment. Verizon instead argued for summary judgment on the basis that Peerless cannot collect its tariffed end office originating switched access charges for calls customers of Peerless's VoIP partners dialed where a competitive LEC other than Peerless assigned the telephone number to the person placing the call.[32] To the extent Verizon intends on pursuing this alternative argument, the Court refers that issue to the FCC as well.

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[31] In supplemental briefings, Verizon argued that the Court could decide the issue based on a recent order in *O1 Communs., Inc. v. AT&T Corp.*, No. 16-cv-01452, Dkt. 106, 2017 U.S. Dist. LEXIS 219510 (N.D. Ca. Dec. 19, 2017). The court there held that when a CLEC like Peerless routes over-the-top Voice-over-Internet Protocol ("VoIP") traffic, the services that a telephone company provides are "not end office access services" or a "functional equivalent of those services." *Id.* at 2. Instead of following the *Teliax* court's approach of referring the matter to the FCC, the *O1* court decided that VoIP calls are not the functional equivalent of end office access services, relying on *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016). The Court finds that the AT&T Order did not go so far to find that VoIP traffic is not the functional equivalent of end office access services. Rather, it merely held that the FCC had not sufficiently explained what constitutes the functional equivalent of end office access services. This issue is proper for the FCC to decide, not a court lacking the appropriate technical knowledge.

[32] The Court is skeptical of Verizon's arguments on this issue. 47 C.F.R. § 61.26(f) appears to pose two alternatives to collection of switched access charges: (1) calls where the CLEC provides service to the end user where the CLEC may assess a rate not to "exceed the rate charged by the competing ILEC for the same access services provided" as long as the CLEC "provides some portion of the switched exchange access services used to send traffic to or from an end user," and (2) calls where the CLEC is the assigning carrier in the NPAC database, for which the CLEC may assess "a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number." 47 C.F.R. § 61.26(f). Verizon argues that Peerless can collect only for the second category. But 47 C.F.R. § 61.26(f) does not require Peerless to be the assigning carrier in the NPAC database to charge for the services it provides. It only requires Peerless be the assigning carrier to charge the rate charged "for all exchange access services." Nor does the Court agree with Verizon's argument that because "Peerless *alone* does not provide end office switching," it is not entitled to charge the tariffed rates for

III. Verizon's 8YY Argument

Verizon's final claim against Peerless's Tariff collection action is that Peerless cannot collect its tariffed end office [*36] terminating switched access charges for calls that it delivers to a two-stage dialing platform—such as those used to place international calls with a prepaid calling card—because Peerless does not terminate those calls.

The FCC has described two-stage calls as follows:

> A calling card customer typically dials a number to reach the service provider's centralized switching platform and the platform requests the unique personal identification number associated with the card for purposes of verification and billing. When prompted by the platform, the customer dials the destination number and the platform routes the call to the intended recipient.

Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd 4826, ¶ 3 (2005). Relying on *Broadvox-CLEC, LLC v. AT&T Corp.*, 184 F. Supp. 3d 192 (D. Md. 2016) (Dkt. 119)), Verizon argues that the FCC treats such two-stage calls as a single, "end-to-end" call that terminates at the location where the person answers the telephone, and that as such, Peerless does not terminate the call because it hands the call off to the calling card platform rather than the end-user. *See* R. 162 at 25-26.

Peerless disagrees. It argues that the end-to-end approach relied on by *Broadvox-CLEC* was adopted before the advent of IP enabled [*37] services, and that because internet communications do not have a point of termination, "the fact that the VoIP provider 'may originate further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP.'" R. 236 at 39-40 (citing *Bell Atlantic Telephone Co.'s v. F.C.C.*, 206 F.3d 1, 7, 340 U.S. App. D.C. 328 (D.C.C 2000)). Peerless argues that the FCC "has confirmed that ISP traffic is not governed by the end-to-end analysis, because a call to an ESP/ISP is 'a continuous transmission from the end user to a distant Internet site.'" *Id.* at 40-41. Peerless also cites the FCC's *Declaratory Ruling* in support, which concludes that a CLEC is entitled to charge switched access on calls destined to a VoIP partner:

> Specifically, under the ESP exemption, rather than paying intercarrier access charges, information service providers were permitted to purchase access to the exchange as end users, either by purchasing special access services or 'pay[ing] local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices' . . . the Commission has always recognized that information-service providers providing interexchange services were obtaining exchange access from the LECs.

*Declaratory Ruling [*38]* , ¶ 957 (citations omitted). In sum, the question boils down to whether two-stage calls "terminate" upon transfer to a VoIP provider, even if the call continues to an international number.

The *Broadvox-CLEC* court analyzed the FCC Orders and case law surrounding this issue. *See Broadvox-CLEC*, Dkt. 119, at 25-32. All that matters here is that the FCC eventually announced that jurisdiction over IP-transport calling card calls would be governed by the end-to-end analysis, meaning that calls made with prepaid cards that originate and end in the same state are intrastate, regardless of a call's actual route. *In the Matter of Regulation of Prepaid Calling Card Servs.*, 21 F.C.C. Rcd. 7290 at ¶¶ 10, 27 (2006), *vacated on other grounds by Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531, 534, 379 U.S. App. D.C. 4 (D.C. Cir. 2007). But the FCC did not discuss whether the end-to-end approach should be used to determine switched access charges.

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over-the-top VoIP calls provided by it and its VoIP partners. R. 178 at 21. Verizon provides no support for this assertion. Indeed, the VoIP Symmetry Rule explicitly allows Peerless to charge a rate that does not exceed the rate charged by the ILEC for "access services provided" by "contractual or other arrangements with an affiliated or unaffiliated provider of interconnection VoIP service." 47 C.F.R. 51.913(b). However, because the AT&T Order questioned whether CLECs like Peerless can collect under the VoIP Symmetry Rule at all, the Court finds referral appropriate.

After analyzing the state of the end-to-end approach, the *Broadvox-CLEC* court determined that the approach should be applied both for jurisdictional purposes (*i.e.*, to determine whether particular traffic is interstate to assess appropriate compensation) and non-jurisdictional purposes (*i.e.*, here, to determine whether Peerless can assess its terminating switched access charges). The court based its determination partly on the [*39] *Bell Atlantic* case. The *Broadvox-CLEC* court found that the D.C. Circuit in *Bell Atlantic* remained silent on whether the end-to-end approach could be applied beyond the jurisdictional analysis. *See Broadvox-CLEC*, Dkt. 119, at *30 ("But, significantly, *Bell Atlantic* also does not hold that the end-to-end analysis cannot apply outside the jurisdictional context.") *Broadvox-CLEC* then relied on two FCC orders[33] to state that attempts to distinguish between the "jurisdictional" nature of a call from its status for "billing" purposes were unwarranted, and that as a result, the FCC "has made it clear that the end-to-end analysis applies for purposes of determining access charges, as well as for jurisdictionalizing." *Broadvox-CLEC* at 32.

The Court does not find *Broadvox-CLEC* convincing. It appears to oversimplify the D.C. Circuit's holding in *Bell Atlantic*, and it fails to recognize the important distinctions between services provided by traditional telecommunications providers and internet service providers ("ISPs").[34] As with the access stimulation claim and the VoIP issue, however, the Court refers this issue to the FCC in light of the D.C. Circuit's ruling in the AT&T Order, which may [*40] affect how CLECs charge for services provided with VoIP partners.

In practice, a primary jurisdiction referral means that the court either stays the case or dismisses it without prejudice, so that the parties may seek an administrative ruling. There is no formal transfer of the case. Rather, the parties are responsible for initiating administrative proceedings themselves. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (citations omitted); *see Great Lakes Communication*, 2014 U.S. Dist. LEXIS 85597, 2014 WL 2866474, at *15 ("When primary jurisdiction applies, a federal court may either stay or dismiss a claim in favor of the appropriate agency.").

Accordingly, Verizon's summary judgment motion regarding access stimulation, VoIP, and the 8YY calls against Peerless's collection claims is denied without prejudice. Verizon's Counterclaims I and III, which seek to recoup amounts paid by Verizon to Peerless under the Tariff and seek a declaration on Verizon's rights going forward under the Tariff, are stayed pending decision by the FCC on the access stimulation issue. If Verizon chooses not to file a complaint with the FCC on that issue by June 15, 2018, Verizon's Counterclaims I and III will be dismissed.

IV. PEERLESS'S COLLECTION CLAIMS[35] (COUNTS III AND IV)

The conclusion that Verizon's arguments should [*41] be referred to the FCC under the primary jurisdiction doctrine does not end the Court's inquiry. It remains to be seen how that referral impacts Peerless's collection action to recover for switched access fees for which Verizon has refused to pay. Despite the complexity of the subject matter,

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[33] *Teleconnect Co. v. Bell Tel. Co. of Penn.*, 10 FCC Rcd. 1626 (1995) and *In re Long Distance/usa, Inc.*, 10 FCC Rcd. 1634 (1995).

[34] The D.C. Circuit in *Bell Atlantic* was skeptical of using the end-to-end analysis outside of the jurisdictional context. *Bell Atl. Tel.*, 206 F.3d at 7 ("However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation."). The court was also skeptical of applying the analysis to ISPs. For example, the court noted the difference between traditional long-distance carriers and ISPs. *Id.* It explained that ISPs are not necessarily telecommunications providers, but may be information services providers, and that the FCC had not offered significant explanation as to why ISPs were not communications-intensive business end users selling products to other consumer and business end-users. *Id.* at 7-8 (vacating a ruling "[b]ecause the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as 'terminat[ing] ... local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service.'").

[35] THE COURT REFERS PRIMARILY TO THE ACCESS STIMULATION CLAIM AND ITS EFFECT ON THE TARIFF IN THIS SECTION, BUT THE REASONING IN THIS SECTION APPLIES TO THE PARTIES' DISPUTE ON THE VOIP AND 8YY ISSUES AS WELL.

the volume of briefing devoted to the issue, and the number of disputed issues of fact on which the parties' arguments are based, the crux of this case is captured in a single sentence in Verizon's response to Peerless's statement of additional facts, where Verizon states:

> Verizon admits that it did not challenge Peerless's rates with state commissions or the FCC, but *denies* any implication that *it had the obligation to do so*. Instead, *Peerless* had *the obligation* to file *lawful* tariffs with state commissions and the FCC.

R. 178-1, Resp. to PSOF, ¶ 17 (emphasis added). This admission raises a central question: does Verizon have the right to unilaterally declare Peerless's Tariff unlawful and then withhold payments otherwise required to be made under the Tariff, without ever seeking an authoritative resolution of that issue through either an action filed in court or a complaint brought before the [*42] FCC,[36] thereby transferring the litigation burden to Peerless, which is required by law to continue providing Verizon the services for which Verizon is refusing to pay? The Court turns to that question now.

A. The Filed Rate Doctrine

Before the Tariff became effective, the parties that Peerless would bill under it, including Verizon, had a fifteen-day window to object to the terms and rates set out in that document. *See* 47 U.S.C. § 204(a)(3). The FCC itself could also reject, suspend, or investigate the Tariff. *See* 47 C.F.R. § § 61.69; 61.191. Neither Verizon nor any other party objected to the Tariff, and the FCC also took no action. *See* R. 73, Am. Compl., ¶ 40 ("Verizon had an opportunity to object to this tariff and/or any amendments or modifications thereto when they were filed but did not do so, and the FCC permitted this tariff to become effective without suspension."); R. 75, Verizon Answer, ¶ 40 ("Admitted that Verizon did not file objections with the FCC during the period between Peerless's tariff filings and Peerless's chosen effective date for those filings."). Verizon does not contest that Peerless filed the Tariff with the FCC, that Verizon received services under the Tariff, or that Peerless billed the rates [*43] set forth in the Tariff.[37]

"The filed-rate doctrine comes into play when an entity is required to file rates for its services with a governing regulatory agency and the agency has been given exclusive authority by federal statute to set, approve, or disapprove the rates." *First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n*, 214 F. Supp. 3d 723, 731 (S.D. Ill. 2016) (citing *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 607 (7th Cir. 2013)). The doctrine forbids an entity from charging any rate that is different than the one properly filed and approved; this protects consumers from unreasonable or discriminatory rates. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998); *see Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 867 (9th Cir. 2013) ("[T]he initial raison d'être for the doctrine concerned stabilizing rates and preventing pricing discrimination amongst ratepayers.").

More important to this case, the doctrine protects public utilities and other regulated entities from civil actions attacking rates that are subject to federal agency approval and disapproval, prevents courts from becoming "enmeshed in rate-making," and preserves "the agency's primary jurisdiction over reasonableness of rates." *First Impressions Salon*, 214 F. Supp. 3d at 731; *see also Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (a customer cannot ask the court in a civil rights or antitrust suit to invalidate or modify a rate); *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) ("Simply stated, the doctrine holds that any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and [*44] unassailable in judicial proceedings

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[36] *See* 47 U.S.C. §§ 204-205 (granting the FCC the ability to either "upon complaint or upon its own initiative" determine the lawfulness, justness, and reasonableness of charges under the chapter).

[37] *See* R. 176-1, Resp. to PSOF, ¶ 32 (responding "undisputed" to the statement that "Peerless's FCC Tariff No. 4 was initially filed . . . with an effective date of September 28, 2013"); *id.*, Resp. to PSOF, ¶ 15 (responding "undisputed" to the statement that Verizon "delivered traffic to, and received traffic from, Peerless's Network"); *id.*, Resp. to PSOF, ¶ 16 (responding "undisputed" to the statement that Verizon received services under the Tariff); *id.*, Resp. to PSOF, ¶ 47 (responding "undisputed" to the statement that, "[f]rom January 2010 through July 2015, the vast majority of Peerless's rates were addressed on a composite rate for the switch access functions identified in its tariffs").

brought by ratepayers.") (citation omitted); *Alliance Communs. Coop., Inc. v. Global Crossing Telecomms., Inc.*, 2007 U.S. Dist. LEXIS 48091, 2007 WL 1964271, at *3 (D.S.D. July 2, 2007) (under "[the filed rate] doctrine, once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be the law and to therefore conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer." (quoting *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)) (internal quotation marks omitted).

The principle that a ratepayer may not seek to invalidate or modify a tariff rate in a collection action brought by the service provider serves the purpose of preventing courts from becoming involved in rate-making, and preserves "the agency's primary jurisdiction over reasonableness of rates." *Arkansas Louisiana Gas Co.*, 453 U.S. at 577-78; *see Arsberry*, 244 F.3d at 562 ("[t]he filed-rate doctrine . . . is based . . . on historical antipathy to rate setting by courts, deemed a task they are inherently unsuited to perform competently"). "[I]f customers were allowed to challenge the rate in court, varying litigation outcomes might result in non-uniform rates." *Simon*, 694 F.3d at 205; *see also Great Lakes Commun'c Corp.*, 2014 U.S. Dist. LEXIS 85597, 2014 WL 2866474, at *13 ("The filed tariff doctrine prevents a court from awarding any form of relief that would have the effect of imposing rates other than those reflected in a duly-filed tariff.").

A straight-forward [*45] application of the filed-rate doctrine shows that Verizon has gotten it backwards. Verizon was required to pay the charges invoiced pursuant to the Tariff first. Then, Verizon could challenge those charges by either filing suit in federal court or filing a complaint with the FCC. *See Frontier v. AT&T*, 957 F. Supp. 170 (C.D. Ill. 1997) ("The prevailing rule is that a customer must pay filed rates before contesting them.").

Verizon responds that the filed tariff doctrine does not preclude all legal challenges to a tariff. That much is true. As the FCC has stated:

> [T]he Filed Rate Doctrine does not insulate tariffs from legal challenge. As we have previously stated, "it is well established that the rates and practices carriers seek to shelter pursuant to the Filed Rate Doctrine are always subject to an inquiry into their reasonableness." Where, as here, Commission determines that a tariff violates [47 U.S.C. § 201(b)], the Filed Rate Doctrine is no defense.

In re Bell Atlantic-Delaware, Inc. 15 FCC Rcd. 20665, ¶ 20 (2000). But the Court's ruling is not that Peerless's Tariff is unassailable simply because it went into effect without any legal challenge. Rather, the Court finds that Verizon had a duty to raise a legal challenge to the Tariff, not simply decide on its own that the Tariff was invalid and refuse [*46] for years to make payments under it.

Despite some ambiguity in FCC pronouncements on the issue, *Connect America Fund*, which established the access stimulation rule, supports the Court's view of the timing and burden issue with respect to Verizon's access stimulation challenge to Peerless's Tariff. *Connect America Fund* states that "enforcement of the new access stimulation rules in instances where a LEC meets the conditions for access stimulation but does not file revised tariffs" should proceed as follows:

> IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition, *i.e.*, that the second condition has been met. If the IXC filing the complaint makes this showing, the burden will shift to the LEC to establish that it has not met the access stimulation definition and therefore that it is not in violation of our rules. This burden-shifting approach will enable IXCs to bring complaints based on their own traffic data, and will help the Commission to identify circumstances where a LEC may be in violation of our rules.

Connect Am. Fund, 26 F.C.C. Rcd. 17663, ¶ 659; *see also id.*, ¶ 699 ("A complaining carrier may rely on [*47] the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules.").

Had Verizon followed the procedure outlined by the FCC in *Connect America Fund*, and filed either a complaint with the FCC or a federal lawsuit challenging Peerless's Tariff as being in violation of the access stimulation rules, it could have sought temporary preliminary relief from making further payments of the challenged charges while the validity of Peerless's Tariff was being litigated. But instead of doing that, Verizon engaged in self-help. It withheld payments to Peerless for more than six years before the suit was filed based on its unilateral determination that Peerless's Tariff was in violation of the access stimulation rule. The *Connect America Fund Order* specifically mentions self-help as an approach some IXCs took:

> *Non-payment Disputes*. Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate [*48] switched access services. As the Commission has previously stated, "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions." We otherwise decline to address this issue in this Order, but caution parties of their payment obligations under tariffs and contracts to which they are a party. The new rules we adopt in today's Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.

Id., ¶ 700. These comments show that the FCC does not approve of IXC self-help tactics. To the contrary, the FCC explains that such tactics fall "outside the context of any applicable tariffed dispute resolution provisions." While the FCC "otherwise" declined to address the topic,[38] its comments clearly indicate that Verizon's unilateral approach to enforcing the FCC's access stimulation rules is in conflict with the filed rate doctrine. *See also CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., L.P.*, 861 F.3d 566, 577 (5th Cir. 2017) ("FCC precedent makes clear 'self-help' is not necessarily permissible." (citing *In re MCI Telecomm.*, 62 F.C.C.2d at 705-06 ("We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services.")), *cert. denied sub nom. [*49] Sprint Communs. Co., L.P. v. CenturyTel of Chatham, L.L.C.*, 138 S. Ct. 669, 199 L. Ed. 2d 587, 2018 WL 311841 (U.S. Jan. 8, 2018).

B. Void AB Initio

Verizon further argues that its self-help strategy is supported by the FCC, because the FCC has said in a number of instances that a tariff not in compliance with the access stimulation benchmark is "void ab initio." According to Verizon, "void ab initio" means that Verizon never became obligated to pay the Tariff in the first place, and therefore the filed rate doctrine does not apply.

To begin with, the Court agrees with Peerless that Verizon's void ab initio argument is an affirmative defense to Peerless's collection action. To establish a right to recover under its Tariff, Peerless "must demonstrate (1) that [it] operated under a federally filed tariff and (2) that [it] provided services to [Verizon] pursuant to that tariff." *Advamtel, LLC. v. AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000). Peerless has shown, and Verizon does not dispute, both of those things. Instead, Verizon argues that the Tariff is void ab initio because it is in violation of the FCC's access stimulation benchmark. R. 75, Counterclaim, ¶ 19 ("Peerless's federal tariff is therefore unlawful and, moreover, is void ab initio"). In other words, Verizon's void ab initio argument seeks to excuse or avoid Verizon's payment under the Tariff. It thus constitutes [*50] an affirmative defense.[39]

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[38] The FCC may have thought it unnecessary to say more because it was optimistic that, "[w]ith the guidance in this Order, . . . parties should in good faith be able to determine whether the definition [of access stimulation] is met without further Commission intervention." *Connect Am. Fund*, 26 F.C.C. Rcd. 17663, ¶ 699. As it turns out, however, the access stimulation benchmark raises a number of interpretative questions, as discussed previously in this opinion, making it not so easy a benchmark to apply.

[39] *See Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1246 (N.D. Ill. 1991) ("An affirmative defense generally admits the matters alleged in a complaint but brings up some other reason why the plaintiff has no right to recovery. It thus introduces arguments not raised by a simple denial."); *see also Ft. Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1377 (7th Cir. 1990) ("The evidence necessary to establish a breach of warranty claim is significantly different from that required to prove the misuse of the baghouse or hindrance of the contract. . . . As such, the alleged defenses do not controvert Fort Howard's proof of breach of warranty and, therefore, are properly labeled affirmative defenses.") (citations omitted). Although Verizon did not assert an affirmative defense against Peerless's tariffs, the requirements of Rule 8(c), governing affirmative defenses, are not absolute and Verizon may assert affirmative defenses "as long as [Peerless] had adequate notice of the defense and was not deprived of the opportunity to respond." *Sterling v. Riddle*, 2000 U.S. Dist. LEXIS 1692, 2000 WL 198440, at *4 (N.D. Ill. Feb.

To make the case that its void ab initio argument is not an affirmative defense, Verizon inserts the requirement that Peerless prove as part of its prima facie case to recover under the Tariff that its Tariff is "lawful." But Peerless is required in its prima facie case to prove that the Tariff be "legal," not that it be "lawful." There is a difference between "legal" and "lawful" rates. The D.C. Circuit explained the distinction between the terms "legal" rate and "lawful" rate in *ACS of Anchorage, Inc. v. F.C.C.*, 290 F.3d 403, 351 U.S. App. D.C. 317 (D.C. Cir. 2002):

> "Legality" mainly addresses procedural validity. "[T]o render rates definite and certain, and to prevent discrimination and other abuses," rates must be filed and published, and deviation from published rates is subject to criminal and civil penalties. *Arizona Grocery*, 284 U.S. at 384. A particular rate thus becomes "legal" when it is filed with an agency and becomes effective. But a rate's legality is not enough to establish its substantive reasonableness or "lawfulness." *See id.* (noting that a rate's legality does not abrogate "the common-law duty to charge no more than a reasonable rate"). A carrier charging a merely legal rate may be subject to refund liability if customers can later show that [*51] the rate was unreasonable. *Id.* Should an agency declare a rate to be lawful, however, refunds are thereafter impermissible as a form of retroactive ratemaking.

Id. at 410-11. As *ACS of Anchorage, Inc.* makes clear, the carrier's prima facie case for enforcement of a tariff requires that it show only that the tariff is legal, *i.e.*, properly filed and effective during the relevant time period. Consistent with it being an affirmative defense, it then is up to the ratepayer to allege and show that the tariff rate is "unreasonable," a standard the D.C. Circuit equated with the term "unlawful."

Verizon points out that the applicable regulation states that an access stimulator "*shall not* file a tariff" that fails to comply with § 61.26(g). *See* R. 162 at 19 ("Peerless violated the FCC's express directive that, as a traffic pumper, it '*shall not* file a tariff' that fails to comply with § 61.26(g).'" (emphasis in original)). According to Verizon, the FCC has explained that this regulatory language implements the FCC's "mandatory detariffing" policy, under which "a carrier *is prohibited from* filing a tariff with rates above the benchmark." *Id.* (quoting *AT&T Servs. Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd 2586, ¶ 28 (2015) (emphasis added)). Verizon also cites to an amicus brief filed [*52] by the FCC in an appeal before the Third Circuit, where the FCC said that it adopted this prohibition because it "better serves the public interest" to prohibit such rates "from being tariffed in the first instance" than to "attempt [ ] to identify such unreasonable rates on an *ad hoc* basis after the tariffs are filed." *Id.* (quoting FCC Brief as *Amicus Curiae* at 27-28, in *PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, Case Nos. 11-2268, *et al.* (3d Cir. Mar. 14, 2012)). Verizon contends that the FCC's opinion in *Great Lakes Comnet* and its amicus brief in the *Paetec* case establish that filing a tariff that does not comply with the access stimulation rules "violates the Commission's Rules and renders the prohibited tariff void ab initio." *Id.* (quoting *Great Lakes Comnet*, 30 FCC Rcd 2586, ¶ 28; FCC Amicus Br. at 2)).

Verizon's reliance on the FCC's comments in *Great Lakes Comnet* and amicus brief in *Paetec* as support for its self-help strategy is misplaced. The void ab initio principle that the FCC discussed in its amicus brief in the *Paetec* case was addressing the question of whether the IXC—AT&T in that case—could recover payments made pursuant to the unlawful tariff. It was not addressing whether AT&T could unilaterally [*53] withhold payments to the CLEC based on its view that the CLEC had violated the access stimulation rules. Even though it was determined that the CLEC was an access stimulator without properly benchmarked rates, AT&T's right to recover charges that later were determined to be improper was at issue because of the "deemed lawful" language in § 204(a)(3). As the D.C. Circuit has explained:

> "[A] streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." [*Streamlined Tariff Order*, 12 FCC Rcd 2170 at 2182], ¶ 19. In accordance with *Arizona Grocery*, these "deemed lawful" tariffs are not subject to refunds. If a later reexamination shows them to be unreasonable, the Commission's available

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11, 2000). "The purpose of the rule is to avoid surprise and prejudice to the plaintiff by providing him notice and the opportunity to demonstrate why the defense should not prevail." *Id.* (citing *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)). Peerless does not argue it did not have adequate notice of Verizon's arguments or that it was prejudiced by Verizon's failure to plead it initially. The Court will address the argument on its merits.

> remedies will be prospective only. *Id.* at 2182-83, ¶¶ 20-21. As the Commission emphatically recognized, § 204(a)(3) effected a considerable change in the regulatory regime: before, tariffs that became effective without suspension or investigation were only legal (not conclusively lawful), and thereby remained subject to refund remedies. *Id.* at 2176, ¶ 8.

ACS of Anchorage, Inc., 290 F.3d at 411. It is to this situation that the FCC's void ab initio argument applies. In other words, *Paetec* deals [*54] with how IXCs may recover for tariffs "deemed lawful" but that are later deemed unreasonable by the FCC. It does not hold that Verizon can engage in self-help and unilaterally withhold payments to Peerless.

C. Relationship Between Peerless'S Collection Action and Verizon'S Rate Challenge

The Court must now determine whether to stay Peerless's collection action until the FCC resolves Verizon's unreasonable rate claim. As explained by the court in *Frontier Communications*, a claim by one carrier that a tariff is unlawful may be raised only through a counterclaim and not as a defense to the other carrier's collection action. 957 F. Supp. at 174 ("The Supreme Court has held that claims challenging the reasonableness or fairness of common carrier rates asserted in response to collection actions by the common carrier are properly considered counterclaims.") (citing *Reiter v. Cooper*, 507 U.S. 258, 262-63, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)).

In *Frontier*, the court held that AT&T had forfeited its right to raise an unreasonable rate counterclaim because it had previously filed suit before the FCC raising the same claim and the statute allowed it to proceed with its claim in only one forum. 957 F. Supp. at 175 (relying on *Cincinnati Bell Tele. Co. v. Allnet Commun'c Servs., Inc.*, 17 F.3d 921, 923 (6th Cir. 1994) (claims to recover unpaid access charges are counterclaims and run afoul of 47 U.S.C. § 207 if the [*55] customer has already filed a complaint relating to the same practices with the FCC)). Here, there is no indication in the record that Verizon has raised its unreasonable rate claim before the FCC. Therefore, Verizon may maintain its unreasonable rate counterclaim in this action. As the Court indicated earlier in this opinion, however, that claim must be referred to the FCC under the primary jurisdiction doctrine.

The Court declines to stay the case pending referral, following the path taken by the *Frontier* court. That court enforced the CLEC's tariff rates, leaving it to the FCC to decide AT&T's claim that Frontier's rates were appropriate. The *Frontier* court held that "[t]he only possible reason to delay a ruling until the FCC decides AT&T's claim is that AT&T might ultimately be entitled to a refund from Frontier of the amount this Court orders AT&T to pay. The risk that Frontier may someday have to pay AT&T back the money it receives in this proceeding is far outweighed by the potential damage that the delay would cause Frontier if the FCC ultimately upholds Frontier's rates." 957 F. Supp. at 176.

The balance of hardships in this case, like the balance in *Frontier*, weighs in favor of Peerless. Verizon [*56] could have challenged Peerless's rate by filing a claim before the FCC or in federal court at any time during the eight years that it withheld payments to Peerless on the belief that Peerless was engaged in access stimulation. It would be unjust, in these circumstances, to place Peerless's collection action on hold while waiting for a decision by the FCC on Verizon's access stimulation argument. The risk that Peerless may have to pay Verizon backdated charges is outweighed by the potential damages to Peerless from further delay in being paid if the FCC ultimately upholds Peerless' tariff against Verizon's access stimulation charge.

Peerless's collection claims on its federal tariffs (Counts III and IV) are granted. Peerless is directed to submit an itemized statement of charges owed, to which Verizon will be given an opportunity to respond before the Court determines the proper amount of damages. *See Frontier*, 957 F. Supp. at 177. The Court will enter a final judgment after the charges are determined. Peerless's declaratory judgment count regarding its interstate switched access services going forward (Count XI), is likewise granted in accordance with the discussion above.

V. Tandem Switched Access Agreement (Counts [*57] I and II)

Peerless also seeks compensation for non-payment of the interstate and intrastate tandem switched access services that were provided and billed pursuant to the Tandem Services Agreement ("TSA").

To state a cause of action for a breach of contract under Illinois law,[40] Peerless must prove four elements: (1) a valid and enforceable contract exists, (2) substantial performance by Peerless, (3) breach by Verizon, and (4) damages resulting from Verizon's breach. *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010) (citations omitted).

There is no dispute that the TSA is a valid and enforceable contract. The TSA, signed in February 2009, provided Verizon a discounted rate on certain originating and terminating, interstate and intrastate, tandem switched access services in various states up through July 2014. R. 155, JSOF, ¶¶ 51-53; R. 178-1, Resp. to PSOF ¶ 23 (undisputed that the TSA provided discounted rates). Peerless issued invoices containing TSA rates corresponding to the amount of traffic billable for each particular month for the intrastate traffic, R. 178-1, Resp. to PSOF ¶ 29 (admitted), and Verizon used the services relating to these invoices. *See* R. 155, JSOF, ¶ 8.

Verizon also does not dispute that it breached the TSA. [*58] *See* R. 178-1, Resp. to PSOF, ¶ 27 (not disputing the existence of at least one unpaid invoice).[41] Instead, it challenges only the amount of damages appropriate for its breach. Verizon claims that Peerless failed to identify the exact charges or invoices Verizon failed to pay, that it never produced the damages figure in discovery, and that Peerless's damage calculation includes charges for which the statute of limitations has run. *See* R. 178 at 28-29. Peerless will have the opportunity to present the Court with evidence on the validity of the charges in later proceedings, using a procedure akin to the one described in the Court's ruling in Section IV.C. of this order.

Peerless's motion for summary judgment on Counts I and II is granted.

VI. STANDSTILL AGREEMENT (COUNT X)

Finally, Verizon moves for summary judgment on Peerless's claim for breach of the Standstill Agreement. Verizon argues that Peerless has not produced any evidence that would allow a reasonable jury to conclude that Verizon breached that Agreement.

Peerless and Verizon entered into the Confidential Standstill Agreement in September 2013. R. 160-11, Standstill Agreement. The parties agreed that Peerless would continue [*59] to bill Verizon for charges that in "good faith" represent services rendered by Peerless, and that Verizon would pay any such charges that were not subject to a "good faith dispute." *Id.* at Section 2(b). Verizon acknowledged in the Agreement that it withheld payments on Peerless's charges, and Verizon has continued to withhold payments on Peerless's charges since the Standstill Agreement took effect. In its Amended Complaint, Peerless alleges that Verizon failed to pay Peerless's originating and terminated end office and tandem switched access charges for the period from April 2012 to June 2014. R. 73 (Am. Compl., ¶¶ 50-58.)

Peerless's claim for breach of the Standstill Agreement hinges on whether Verizon acted in good faith. Acting in good faith requires honesty in fact. *Gas Natural v. Iberdrola*, 33 F. Supp. 3d 373, 382 (S.D.N.Y. 2014).[42] But self-interest is not bad faith, and acting in a financial self-interest, or for a good faith business judgment, does not represent bad faith. Instead, "bad faith requires some 'deliberate misconduct'—arbitrary or capricious action taken out of spite or ill will or to back out of an otherwise binding contractual commitment." *Id.* at 383. "Whether particular conduct violates or is consistent with the duty of good faith and fair dealing [*60] necessarily depends upon the

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[40] Illinois law governs the TSA. *See* R. 160-5, Tandem Service Agreement, at Section 12.

[41] Throughout this litigation, Verizon had admitted it has withheld payments under the Tariff and the TSA. *See, e.g.*, R. 75, Verizon. Answer, ¶ 99 (admitting that Verizon continues to dispute and withhold amounts for switched access service charges).

[42] New York law governs interpretation of the Standstill Agreement. R. 160-11, Standstill Agreement, at Section 10.

facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact." *Id.* (citations omitted).

As purported evidence of bad faith, Peerless cites Verizon's admission that it withheld payments for charges that it admits are payable without calculating what it believes it is owed under its counterclaim. *See* R. 236 at 45. Peerless also argues Verizon did not submit any dispute provisions in Peerless's tariffs for any of the charges at issue in this action. *Id.* Verizon disputes these allegations, arguing that it deducted amounts from current bills to recoup charges on unresolved disputes. *See* R. 178 at 24. Verizon says this is neither prohibited by the Standstill Agreement nor probative of bad faith.

As the Court held in its order on Verizon's Motion to Dismiss, nothing on the face of the Standstill Agreement prohibits Verizon from disputing charges paid before the effective date of the Standstill Agreement. R. 69 at 17. Further, Peerless fails to present any concrete evidence showing that Verizon acted in bad faith under the Standstill Agreement. Instead, the undisputed evidence shows a disagreement as to the [*61] amount owed under Peerless's Tariffs and the TSA. Because Peerless has failed to present evidence, from which a reasonable juror could find bad faith and return a verdict in its favor on Count X, Verizon's motion for summary judgment on Count X is granted.

Conclusion

For the foregoing reasons, the Court grants Peerless's motion for summary judgment (R. 170) on its collection counts (Counts III, IV). The Court grants Verizon's motion (R. 159) as to the Standstill Agreement, and denies it in all other respects. The Court refers the access stimulation, VoIP, and 8YY issues to the Federal Communications Commission, and accordingly stays Verizon's Counterclaims I and III.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: March 16, 2018

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EXHIBIT 4

AT&T Brief in Support of Answer,
Level 3 Commc'ns, LLC v. AT&T, Inc.,
33 FCC Rcd 2388 (FCC Feb. 12, 2018)
(No. 17-227)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC

***Complainant*,**

***v*.**

AT&T INC.; BELLSOUTH TELECOMMUNICATIONS, LLC; NEVADA BELL TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE, L.P.; ILLINOIS BELL TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY; OHIO BELL TELEPHONE COMPANY; AND WISCONSIN BELL TELEPHONE COMPANY,

***Defendants*.**

EB Docket No. 17-227
File No. EB-17-MD-003

AT&T BRIEF IN SUPPORT OF ANSWER

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Dated: October 10, 2017

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC ***Complainant,*** ***v.*** **AT&T INC.; BELLSOUTH TELECOMMUNICATIONS, LLC; NEVADA BELL TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE, L.P.; ILLINOIS BELL TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY; OHIO BELL TELEPHONE COMPANY; AND WISCONSIN BELL TELEPHONE COMPANY,** ***Defendants.***	**EB Docket No. 17-227** **File No. EB-17-MD-003**

AT&T BRIEF IN SUPPORT OF ANSWER

INTRODUCTION AND SUMMARY

In 2011, the Commission adopted the *Transformation Order*, which established an initial, multi-year transition to bill-and-keep for certain types of intercarrier compensation. The Commission recently confirmed that, in this initial phase of its transition to a bill-and-keep system, Rules 51.907(g) and (h)[1] re uire price cap LECs to phase out tandem charges *only* when the terminating price cap carrier also owns the tandem in the serving area [2] *i.e.*, when the price cap

[1] 47 C.F.R. 51.907(g), (h).

[2] Public Notice, Parties Asked To Refresh The Record On Intercarrier Compensation Reform Related To The Network Edge, Tandem Switching And Transport, And Transit, WC Docket No.

LEC owns both the tandem and the end office. This reading of the rules is the only viable interpretation of the language of the regulations and the accompanying discussion in the *Transformation Order*.[3] In July, all price cap LECs in the industry filed tariffs consistent with that interpretation, in accordance with prior guidance from Commission staff. Indeed, Level 3's tariff, which must benchmark to ILEC rates under the CLEC access charge rules, treats tandem charges in the same manner as AT&T. The Commission is currently in the process of taking a new round of comment on how to transition all *other* price cap LEC tandem charges to a bill-and-keep system as part of its still-pending, follow-on Further Notice of Proposed Rulemaking.[4]

Level 3's Complaint is premised on an alternate reality in which the Commission adopted an entirely different rule in 2011, and everyone in the industry complied with that different rule, e cept AT&T. Level 3 thinks the Commission already decided, when it adopted Rules 51.907(g) and (h) in 2011, that price cap LECs must *also* apply the step-downs for tandem charges when the price cap carrier hands traffic off to an affiliated wireless or VoIP provider. Although Level 3's real disagreement is with the Commission's rule, Level 3's Complaint falsely paints AT&T as a rogue carrier that has willfully misread a regulation that is clear on its face and to everyone else. And Level 3 spends much of its Complaint making policy arguments that Level 3's position *should* be the rule even though the only uestion in this complaint case is what the Commission actually decided in 2011.

10-90 CC Docket No. 01-92, at 2 (released September 8, 2017) (emphasis added) (*Tandem Refresh Public Notice*) (emphasis added).

[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd 17663, 819, 1312 (2011) (*Transformation Order*).

[4] *See Tandem Refresh Public Notice Transformation Order* 1297-1325 (Further Notice of Proposed Rulemaking, or *FNPRM*).

Level 3 had to create this alternate reality, because the real facts establish that its arguments are without merit. Level 3's position cannot be s uared with the language of the rule, the discussion in the *Transformation Order* and *FNPRM*, or sound policy. First, Level 3's interpretation of the regulation is grammatically nonsensical. Rule 51.907(g)(2) is entitled Transition of price cap carrier access charges, and provides that e ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than 0.0007 per minute. 47 C.F.R. 51.907(g)(2). Level 3 insists that the term terminating carrier must be pulled out of conte t and interpreted to mean *any* entity that performs end office switching functions, or their e uivalent, and then delivers the call to the called party, whether it is a Price Cap Carrier or not.[5] This unbounded reading of terminating carrier is necessary to Level 3's position here, because its argument is that the Price Cap Carrier must apply the step-downs when it is the affiliate that owns the tandem, even if the terminating carrier is not the Price Cap Carrier.

But Level 3's interpretation must account for all situations in which the terminating carrier *or* its affiliate owns the tandem. If the terminating carrier can be any entity terminating a call, then the sentence makes no sense. Under Level 3's interpretation, the regulation literally says that a Price Cap Carrier may charge 0.0007 per minute any time traffic traverses the tandem switch of any terminating carrier in the country.[6] That is obviously an absurd result and

[5] Formal Complaint of Level 3 Communications, LLC, *Level 3 v. AT&T,* EB Docket No. 17-227, 28 (filed Sept. 12, 2017) (Complaint) *see also id*. 34.

[6] If one were to substitute Level 3's supposedly well-settled meaning of the term terminating carrier into Rule 51.907(g), Complaint 28, the Rule would state as follows: e ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the carrier that performs end office switching functions or their e uivalent and then delivers the call to the called party' or its affiliates owns, Tandem-Switched Transport Access Service

renders Level 3's interpretation untenable. The sentence makes grammatical and regulatory sense only if terminating carrier, which appears in a subordinate phrase, is read as a reference back to the Price Cap Carrier at the beginning of the sentence (and which is the entity named in the title of, and that is subject to, Rule 51.907): *i.e.*, the Price Cap Carrier must charge 0.0007 or less *when it is* the terminating carrier.

Level 3's interpretation also improperly assumes that the Commission has already decided important and difficult uestions that are actually still at issue in the *FNPRM* and the current round of comment to refresh the record. In the *Transformation Order*, the Commission recognized that situations in which the Price Cap Carrier did not have its own end user customer taking service pursuant to access tariffs raised fundamentally different issues for a default bill-and-keep scheme. In particular, how to treat those more difficult scenarios is ine tricably bound with the uestion of where to set the network edge the point beyond which the terminating provider cannot charge other carriers for transport and termination. That is why the *Transformation Order* repeatedly states that the initial rule does *not* address the transition in situations where the tandem owner does not own the end office. [7]

Level 3 is arguing, in effect, that the Commission has already decided that the network edge for the traffic at issue should be placed at the price cap LEC tandem. But the Commission has not made that decision. The uestion of where to set the network edge for such traffic raises

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rates no greater than 0.0007 per minute. Level 3's reading of terminating carrier in this conte t makes no sense, whereas the Rule is entirely sensible and can be applied easily in practice so long as terminating carrier to refers to the price cap LECs that are the subject of the rule.

[7] *Transformation Order* 1312 (emphasis added) *see also id*. 819 (For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. owever, transport charges in other instances, *i.e.*, where the terminating carrier does not own the tandem, are not addressed at this time.).

a host of issues relating to wireless and VoIP competition that the *Transformation Order* does not discuss and certainly does not resolve. To the contrary, the Commission did not have an ade uate record to decide those issues in 2011, because it had not received significant comment on the network edge issue up to this point.[8]

E ually important, the central premise of the Complaint that the intercarrier compensation payments for the tandem services at issue will inevitably be reduced to zero is *not correct*. As the Commission's recent Public Notice makes clear, the Commission is still considering whether to set the network edge at the mobile switching center for wireless traffic, and at the media gateway for VoIP traffic.[9] If the Commission adopts those proposals, Level 3 would retain the responsibility to deliver the traffic all the way to those network edges which means that Level 3 would have to compensate AT&T whenever Level 3 elects to use AT&T's tandem and transport to reach those network edges, just as it does today.

Level 3's various policy arguments are wrong, but also irrelevant. Level 3 makes a series of policy arguments, as if the Commission were considering, for the first time, how to implement a transition for tandem switched services. That is uite plainly a false construct. The Commission is not writing on a clean slate, and cannot simply decide, on policy grounds, that it *should* adopt Level 3's position. The only uestion in this case is what the Commission's 2011 rules mean and what policies it adopted in 2011. There is no serious doubt about that uestion, and the Commission and its Staff have already provided the answer. Further, the answer can readily be determined by the te t of the rule and the conte t, including which issues the Commission

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[8] *Id.* 1320.

[9] *Tandem Refresh Public Notice* at 2.

addressed in the 2011 *Transformation Order*, and which ones it left for the *FNPRM*. This case does not call upon the Commission to make any policy judgments.

Moreover, the fact that the Commission consciously chose to pursue a piecemeal approach to the transition, and thus adopted a rule that addresses some tandem switching scenarios but not others, does not undermine the *Transformation Order*'s objectives.[10] The rule at issue is an initial step, and it fully resolves the subjects it addresses. Level 3's real complaint is that the Commission has not resolved the *FNPRM*, and Level 3 should direct its policy arguments to the Commission in the current round of comment to refresh the record. The appropriate course for resolving these lingering issues is to complete the *FNPRM* e peditiously, as the Commission now seems to be doing not to misconstrue and misapply Rule 51.907(g) (and thereby prejudge those issues without a full, industrywide record). In all events, as e plained below, Level 3's specific policy arguments lack merit.

In short, AT&T's and the Commission's interpretation of the rules at issue is correct and, indeed, the only reasonable interpretation of the regulation and the *Transformation Order*. AT&T's tariffs, like those of all other price cap carriers in the industry, comply with the rule and are therefore lawful. Accordingly, there is no basis for a finding of liability against AT&T, and the Commission should dismiss the Complaint.

BACKGROUND

To place the legal issues in a proper conte t, it is necessary to review (i) the Commission's 2011's *Transformation Order* and the multi-year transition it implemented for certain access rate elements, (ii) its *Further Notice of Proposed Rulemaking* seeking comment on the transition for

[10] Complaint 38.

other rate elements and network edge rules, and (iii) the various Commission proceedings related to the Commission's partial transition for tandem and transport prices for price cap carriers.

A. The Commission's Partial Reform of Intercarrier Compensation and Its Gradual Transition of Certain Specified Rate Elements.

The Transformation NPRM. In February 2011, the Commission proposed broad, multi-year reforms to its e isting intercarrier compensation system: it proposed adopting near-term reforms that se uenc ed access rate reductions to ensure appropriate timing of an overall transition, and then outlined, as a future-state, a long-term framework to gradually reduce all per-minute charges. [11]

As to the near-term reductions, the Commission believed it was prudent to adopt interim, temporary rules that provide for a gradual, phased implementation of our proposed reforms. [12] The Commission noted that, while it was possible in principle that all categories of intercarrier compensation rates could be reduced from the beginning of the transition period, a decision to reduc e all rates concurrently would both complicate universal service reform and add to the comple ity of issues that need to be addressed earlier in the transition process, as compared to an approach that deferred certain types of rate reductions until later in the process. *Id*. 553. The Commission thus sought comment on, *inter alia*, how rate reductions should be structured and implemented. [13]

The Commission also sought comment on rules for network edges. [14] As the Commission e plained, proposals to treat traffic under a bill-and-keep methodology typically assume the

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[11] Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, 34, 40, 42 & Fig. 3 (2011) (*Transformation NPRM*).

[12] *Id*. 521.

[13] *Id*. 554.

[14] *Id*. 680.

e istence of a network edge, beyond which terminating carriers cannot charge other carriers to transport and terminate their traffic. This approach re uires that the calling party's service provider transmit, route and otherwise perform all the network functions necessary to deliver traffic to the network edge of the called party's service provider. [15] The Commission noted that, in past reform proposals, a variety of different network edges had been proposed. *Id.*

Transformation Order. In November 2011, the Commission released its *Transformation Order*, in which it determined that a uniform national bill-and-keep framework would eventually be the default regime.[16] Consistent with the *NPRM*, the Commission did not immediately move to bill-and-keep as the default regime, nor did the Commission apply its transitional rate reductions to all types of switched access services. Instead, the Commission adopted a gradual and measured multi-year transition, and did so for only some switched access rate elements such as terminating end office switching and certain transport rate elements and for only certain carriers in specific circumstances. *Transformation Order* 35, 798, 800. For other rate elements, including originating access services, and other tandem switching and tandem transport services, the Commission did not specify the transition to reduce these rates and instead asked for further comment, which was received in 2012. *Id.* 800 *see id.* 1297-1325 (the *FNPRM*) *see infra* Background, Part B.

The Commission e plained that s pecifying the timing and steps for the transition to bill-and-keep re uires us to make a number of line-drawing decisions. *Id.* 809. The Commission rejected any flash cut approaches, finding that they would entail significant market disruption to the detriment of consumers and carriers alike. *Id.* The Commission's transition was intended

[15] *Id.*

[16] *Transformation Order* 34, 736.

to strike the right balance between our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes, while furthering the goal of overall reform. *Id.* 802 *see id.* 801.

After considering a variety of proposals in the record as to these line-drawing decisions, *see id.* 799, the Commission's initial rate reductions in tariffed access charges focused on reducing the difference between intrastate and interstate terminating rates and then on reducing terminating end office rates. *See id.* 800 (the rules focus first on where the most acute intercarrier compensation problems, such as arbitrage, currently arise) *see id.* 804 n.1508. The Commission thus determined that, as part of its initial transition, terminating intrastate access rates should be brought into parity with interstate rates, and that terminating end office rates be transitioned to zero over a multi-year period.[17]

The Commission also determined that it was appropriate to adopt different transitions for price cap carriers (and CLECs that benchmark to price cap carriers) and for rate-of-return carriers. *Id.* 801. The Commission promulgated one rule for rate-of-return carriers and another rule Section 51.907, entitled Transition of price cap carrier access charges that applies the transition to price cap carriers. 47 C.F.R. 51.907 *id.* 51.909 (rate-of-return carriers).[18]

In Section 51.907, the Commission provided that, in two steps, price cap carriers should reduce their tariffed intrastate terminating switched end office and transport rates and reciprocal

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[17] The Commission also capped all interstate switched access and reciprocal compensation rates as of the date of the *Order*, which was December 29, 2011. *See Transformation Order* 801. The Commission also adopted an Access Recovery Charge (ARC) so as to mitigate the effect of reduced intercarrier revenues on carriers. *Id.* 36. The ARC could be assessed only by incumbent LECs, and not CMRS carriers. 47 C.F.R. 51.713.

[18] Although the Commission had considered adopting specific rules applicable to CMRS carriers, *see Transformation NPRM* 511, the Commission e plained in the *Transformation Order* that the transition rules apply to CMRS carriers only to the e tent their reciprocal compensation rates are inconsistent with the reforms we adopt here. *Transformation Order* 801 n.1498 *see id.* 806.

compensation to parity with the interstate access rate by July 1, 2013. 47 C.F.R. 51.907(b), (c) *Transformation Order*, 801. As steps three, four, and five, the Commission re uired price cap carriers to reduce tariffed terminating switched end office and reciprocal compensation to 0.0007 by July 1, 2016.

In step si , the Commission provided that tariffed terminating end office charges would be eliminated for price cap carriers, 47 C.F.R. 51.907(g)(1), and it also began the transition for some but not all transport elements. *Transformation Order*, 819, 1306-12. Specifically, Section 51.907(g)(2) provides that

> e ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than 0.0007 per minute.

For step seven, Section 51.907(h) provides that

> b eginning July 1, 2018, notwithstanding any other provision of the Commission s rules, each Price Cap carrier shall, in accordance with bill-and-keep, as defined in 51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.

Accordingly, the final steps in the Commission's initial, partial transition provide for a stepdown of certain tandem transport rates, specifically, when a price cap carrier owns the tandem and end office service. *See id. see also infra* Part I.A. owever, the Commission e plained that transport charges in other instances, *i.e.*, where the terminating carrier does not own the tandem, are not addressed at this time. *Transformation Order* 819. The appropriate treatment of these other transport charges would be addressed after the Commission received further comment.

B. The Commission's Request For Further Comment As To Network Edge Rules And Remaining Access Rate Elements.

The Commission's 2011 *Transformation Order* also sought further comment on, *inter alia*, the transition for rate elements that are not specifically addressed in the *Order*, including originating and transport. *Transformation Order* 1296 *id.* 1297 (noting that the Commission did not implement the transition for tandem switching and tandem transport in some circumstances). The Commission e plained that it would seek to reach the end state for all rate elements as soon as practicable, but with a sensible transition path that ensures the industry has time to adapt to changed circumstances. *Id.*

As to the remaining tariffed transport charges, the Commission specifically noted that commenters had e press ed concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office. *Id.* 1312. The Commission e plained that Rule 51.907 includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch, but it does not address the transition in situations where the tandem owner does not own the end office. *Id*. The Commission thus sought comment on both the transition and the appropriate end state for such intermediate tandem switching services. *Id*. 1306-10, 1312-13.

Moreover, as the Commission noted, many of those issues are closely related to the issue of how to establish the network edge for purposes of a bill-and-keep rule applicable to such tariffed tandem services. *Id.* 1310. As the Commission e plained, a critical aspect to bill-and-keep is defining the network edge' for purposes of delivering traffic. *Id.* 1320. This is because the edge is the point where bill and keep applies, and a carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge. *Id.* Thus, based on where the network edge is set, a carrier originating its customers' calls would be re uired to either deliver traffic to the edge itself, or to pay a negotiated fee with another provider. For e ample, the Commission noted that the edge could be the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway.' *Id.* (uoting *Transformation NPRM*, 680). On calls to wireless customers, if the network edge were set at the called party's mobile switching center, then an originating carrier that did not itself deliver the calls to that point would be paying another provider a negotiated rate for transport. The Commission thus invited comments on the e isting and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport. *Id.* 1310. The Commission, however, emphasized that it had not and could not decide any of these issues in 2011, because it had not received significant comment on the network edge issue up to this point. *Id.* 1320.

C. The Commission's Recent Proceedings on The Existing Transition.

Despite the Commission's re uest for further comment, and its statements that failure to take action promptly on the *FNRPM* could perpetuate inefficiencies, delay the deployment of IP networks and IP-to-IP interconnection, and maintain opportunities for arbitrage, *Transformation Order* 1297, the Commission has yet to put in place additional transition rules. For price cap carriers, the Commission's initial transition is due to end as of July 2018, and in 2011 the Commission clearly e pected that a further transition would be in place and possibly even complete by this time. *See id.* 801 *see, e.g.*, *id.* 1299, 1308 (noting that some commenters suggest ed that transport rates be reduced at a pace that coincides with our current transition for end office switching). In light of the inaction, AT&T last year filed a Petition for Forbearance, in which it both (i) urged the Commission to take prompt steps to complete intercarrier compensation reforms and (ii) demonstrated that immediate forbearance relief as to certain charges (tandem and transport associated with access stimulation, and 8 database uery charges) was re uired under the criteria Congress established in 47 U.S.C 160.[19]

1. The Staff's Guidance on the Transition. Even though no further transition has been set, the Commission and its Staff have engaged this year in a number of proceedings to address the final steps of the initial transition. In April of this year, the Commission's Staff issued its annual order in which it detailed the various material that LECs should include with their access filings to implement the transition, which included the re uired step-down for transport and termination provided by price cap carriers when they route calls to their own price cap LEC end offices.[20] Consistent with past practices, the price cap LECs informally met with Commission Staff to discuss the tariff filings, and in doing so, the price cap LECs asked for and received guidance from Commission Staff on the step-downs re uired by Section 51.907(g).[21]

[19] Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. 160(c), *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges,* WC Docket No. 13-363, at 3 (filed Sept. 30, 2016) (AT&T Forbearance Petition).

[20] Order, *Material to be Filed in Support of 2017 Annual Access Tariff Filings*, 32 FCC Rcd 3168, 15 (2017) (noting that t his year, the Access Reduction Spreadsheets which identify rates that are re uired to be reduced pursuant to section 51.907(b)-(g) of the Commission's rules, and calculate the amount of the reductions have been modified to reflect rate reductions re uired by section 51.907(g) of the Commission's rules.).

[21] *See* Petition of Century Link for Limited Stay of *Transformation Order* ears 6 And 7 ICC Transition As It Impacts A Subset Of Tandem Switching And Transport Charges, *Connect America Fund, et al.,* Docket Nos. 10-90, *et al*., at 2-3, 6 (filed Apr. 11, 2017) (*CenturyLink Stay Petition*) (price cap carriers have had a number of discussions within customary industry discussion groups formed to assist carriers as they anticipate the comple ities associated with their annual tariff filings and those groups have reached-out to Commission staff, as is customary, for related guidance.). *See also, e.g.*, 47 C.F.R. 0.91(k) (the functions of the Wireline Competition Bureau include interactions with industry groups on wireline telecommunications regulation and related matters.) 47 C.F.R. 1.1204(b)(3) (e empting communications to and from Commission personnel relating to tariff proceedings before being set for investigation from Commission *ex parte* rules).

The Commission Staff confirmed that, where the price cap carrier owns both the tandem switch and the subtending end office, the price cap carrier's tariffed terminating tandem and transport rates should be stepped down to 0.0007 per minute. *See CenturyLink Stay Petition* at 6 (describing guidance). The Commission Staff also confirmed that the step down in Section 51.907(g) does not apply when the price cap carrier does not operate both the terminating tandem switch and the terminating end office switch. *See id.* This would include situations when the price cap carrier hands off the call to the end office of an unaffiliated entity that is not a price cap carrier. *See id.* And, critically for this proceeding, the Commission Staff confirmed that, when price cap carriers use their tandem to hand off calls for termination to a wireless carrier's facility, the step down in Section 51.907(g) also does not apply. *See id*. As e plained below, in the latter situations, when the price cap carrier does not own both the tandem and end office, the Commission would need to consider additional and more comple uestions, including the choice of the network edge accordingly, it would be premature to step down tandem and transport rates until the Commission has set a further transition and has addressed the network edge and other issues. *See infra* Part I.A.

2. The CenturyLink Stay Petition. Not long after the Commission Staff's guidance, CenturyLink, which is Level 3's proposed merger partner, asked the Commission to stay Sections 51.907(g) and (h), which set forth the step-downs for price cap carriers' terminating tandem and transport rates. *See CenturyLink Petition for Stay*, at 1-2. Even though Level 3's Complaint in this proceeding argues that the step-downs are clear, the asserted basis for the CenturyLink stay re uest was that the step-downs had ambiguities and contradictions. *Id.* at 6. Contrary to Level 3's position that Section 51.907(g) can only be interpreted in the way Level 3 is proposing, Level 3's merger partner believed that there would be a confusing morass and considerable disagreement and confusion about how to implement the step-downs. *Id.* at 2-3. AT&T opposed the Petition on multiple grounds arguing that the Commission should not stay its e isting reforms but instead should move forward with the remaining reforms. AT&T also e plained that price cap carriers would be able to implement the step-downs in Section 51.907(g) and (h) without difficulty, both because of the Staff's guidance, and because the Staff's guidance was the most reasonable reading of the Commission's rules.[22] The Commission has not acted on CenturyLink's petition.

3. Price Cap LECs' Implementation of the Staff Guidance And The Commission Staff's Denial Of Petitions to Suspend. A few months later, price cap LECs (and CLECs benchmarking to price cap LECs) began to file revisions to their access tariffs reflecting the step-downs re uired by Section 51.907(g).[23] Contrary to CenturyLink's predictions, there was no serious confusion, and all price cap carriers implemented Section 51.907(g) consistently and as determined by the Commission's Staff's guidance. In other words, no price cap carrier implemented Section 51.907(g) in the manner that Level 3 suggests is compelled by the te t of the rule. All price cap LEC carriers have filed tariffs that price their terminating tandem and transport access services at 0.0007 when the price cap LEC owns both the terminating tandem and end office switches. No price cap LEC carrier has stepped down its terminating tandem and transport rates down to 0.0007 when the price cap carrier hands off calls to a wireless carrier.

In fact, Level 3 itself has revised its access tariff to reflect this reading of the rule. For its Switched Transport Usage Rates Tandem Switching & Multiple ing, Level 3's tariff provides

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[22] Comments of AT&T in Opposition to CenturyLink Petition for Stay, *Connect America Fund*, WC Docket No. 10-90, at 11-15 (filed May 4, 2017) (AT&T Opp. To Stay Petition).

[23] *See, e.g.,* Ameritech Operating Companies Description and Justification, Transmittal No. 1859, at 1 (June 7, 2017).

for two types of terminating access rates: Terminating To Company End Office and Terminating To 3rd Party. [24] While the tandem rates for Company End Office have been stepped down so that they do not e ceed 0.0007 per minute, any other tandem switching charges have not been stepped down and remain priced at their previous levels. *See id.*

Even though the price cap LECs' access tariff revisions complied with the re uirements of Rule 51.907(g) and the Commission Staff's guidance of that provision, several parties, including Level 3, filed Petitions to Suspend some of the tariffs. *See generally July 1, 2017 Annual Access Charge Tariff Filing,* WC Docket No. 17-65. Level 3's Petition, which was not timely filed, raised the same types of arguments it raises in this proceeding, and claimed that AT&T's access filings were flatly inconsistent with the terms of Section 51.907(g)(2). [25] AT&T and other price cap LECs opposed the petitions[26], and on July 7, 2017, the Commission issued a Public Notice in which it stated that w e conclude that none of the parties filing petitions against the tariff transmittals at issue have presented compelling arguments that the transmittals are so patently unlawful as to re uire rejection. Similarly, we conclude that none of the parties have presented issues regarding the tariff transmittals that raise significant uestions of lawfulness which re uire

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[24] Level 3 Communications, LLC, Tariff F.C.C. No. 4, 15.1.3.4.5.2, 15.1.3.4.5.3 Original Pages 68.1 to 68.4 (filed July 14, 2017). In the Level 3 tariff, Company is defined as Level 3 Communications, LLC, the issuer of this tariff. *Id.* 1, Third Rev. Page 6. Thus, to the e tent Level 3 were to pass on calls to an affiliate, including any affiliated CLEC, VoIP provider, or CMRS provider), Level 3's tariff provides that Level 3 (like AT&T, other price cap LEC and benchmark CLEC carriers) will not charge a 0.0007 rate for tandem service.

[25] Petition Of Level 3 To Reject Or Suspend And Investigate, *July 1, 2017 Annual Access Charge Tariff Filings*, WC Docket No. 17-65, at 5 (filed June 23, 2017). Even though all price cap LECs implemented their tariff filings uniformly, Level 3 filed a petition to reject only AT&T's tariffs.

[26] AT&T's Opposition to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend and Investigate AT&T Tariff Filings, *Annual Access Charge Tariff Filings*, WC Docket No. 17-65 (filed June 27, 2017) Opposition of Verizon to the Petitions to Reject and Suspend, *July 1, 2017 Annual Access Charge Tariff Filings*, WC Docket No. 17-65 (June 27, 2017).

their investigation.[27] AT&T's tariffs, which were filed on fifteen days' notice pursuant to 47 U.S.C. 204(a)(3), were thus not suspended and became deemed lawful.

4. The Commission's Recent Refresh Public Notice. On September 8, 2017, the Commission issued a Public Notice asking parties to refresh the record as to the transition issues left open in the *Transformation Order*.[28] In that release, the Commissioned noted that it still had not addressed the network edge, or the remaining categories of access charges not subject to the initial transition. In particular, as to tandem and transport, the Commission confirmed, yet again, that the rate transition adopted in the *USF/ICC Transformation Order* reduced tandem switching and transport charges only when the terminating price cap carrier also owns the tandem in the serving area. *Id.* at 2.

ARGUMENT

I. AT&T'S – AND THE COMMISSION'S – INTERPRETATION OF RULE 51.907(g)(2) IS CORRECT.

It is well established that, in order t o ascertain how best to interpret a Commission rule , we must e amine the rule's te t, history, purpose, and structure.[29] AT&T's interpretation of the rule which comports with the interpretation of the staff, all price cap carriers in the industry, and the Commission itself in the *Tandem Refresh Public Notice* is compelled by the language and structure of the regulation and the accompanying discussion of the rule's history and purpose in the *Transformation Order*. Level 3's alternative interpretation, by contrast, (1) relies on an interpretation of the regulation that is grammatically nonsensical (2) disregards the conte t and

[27] Public Notice, *Protested Tariff Transmittals, No Actions Taken*, DA 17-654, WC Docket No. 17-65 (rel. Jul. 7, 2017).

[28] *See Tandem Refresh Public Notice*.

[29] *Center For Commc'ns Mgmt. v. AT&T Corp*., 23 FCC Rcd. 12249, 11 (2008).

wishes away the *Transformation Order* by ignoring or misreading that order's e tensive discussion of these issues and (3) rests on policy arguments that are irrelevant to this complaint proceeding but are misguided in all events.

A. Rule 51.907(g)(2) Applies Only To Price Cap LECs That Own The End Office.

The rules at issue apply to Price Cap Carriers that are also the terminating carrier *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch.[30] This is clear from both the te t of the regulation and the *Transformation Order* which, as a matter of law, *together* constitute the rule.[31]

The *Transformation Order* e plains clearly how the rule works. The initial transition to bill-and-keep as the default regime focuses on Price Cap Carriers that own the end office, because from the Commission's perspective in 2011, carriers in that situation presented the simplest and most straightforward scenario for the initial transition to bill-and-keep. Price Cap Carriers in that situation have end user customers that take service pursuant to tariffs.[32] Bill-and-keep for such

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[30] 47 C.F.R. 51.907(g) & (h) *Transformation Order* 1312. These transitions also apply to CLECs like Level 3 that benchmark their rates to price cap carriers under the CLEC access charge rules. *Transformation Order* 801, 807, 866 47 C.F.R. 61.26. Level 3's Complaint focuses *solely* on Rule 51.907(g)(2), which re uires the ear Si step-down for tandem rates to 0.0007 per minute. *See, e.g.*, Complaint 71 (prayer for relief). Level 3's Complaint never mentions Rule 51.907(h), which re uires the ear Seven step-down to zero and for all relevant purposes uses the same language.

[31] When engaged in notice-and-comment rulemaking, an agency must incorporate in the rules adopted a concise general statement of their basis and purpose, 5 U.S.C. 553(c), and the agency's statement should be fully e planatory of the complete factual and legal basis as well as the object or objects sought. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (uoting S. Doc. No. 79-248 (1946)). Given that the full e planation of the rule at issue appears only in the *Transformation Order*, that discussion is just as much part of the rule as the te t of the regulation.

[32] *See, e.g., Qwest Commc'ns Corp. v. No. Valley Commc'ns,* 26 FCC Rcd 8332, 5 (2011) (The Commission's rules governing these ILEC tariffs traditionally provide that ILECs may recover access service costs through charges assessed on both IXCs and end users.'), *aff'd*, 717 F.3d 1017 (D.C. Cir. 2013).

carriers can thus be handled entirely within the e isting access charge regime, because such carriers can simply shift the recovery of their tandem and end office switching costs to their end user tariffs, to the e tent appropriate.[33] Rule 51.907 thus establishes a gradual transition in which such a Price Cap Carrier's switching charges are slowly phased out, beginning with end office charges and ending, in ears Si and Seven, with such a carrier's tandem charges.

The Commission issued a further notice of proposed rulemaking to establish a separate bill-and-keep transition for all *other* price cap LEC tandem charges. In 2011, the Commission reasonably concluded that the transition for tandem charges when the price cap LEC does *not* own the end office switch, and thus has no end user customers, presented very different issues. The *FNPRM* specifically noted that commenters had e press ed concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office. [34] In response, the Commission e plained that Rule 51.907 includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch, but it does *not* address the transition in situations where the tandem

[33] *Cf.* 47 C.F.R. 51.713. To that end, the Commission adopted the Access Recovery Charge (ARC), which is a transitional recovery mechanism from certain end users (or the CAF Fund) that helped offset the loss of revenues reduced as part of this Order. *Transformation Order* 847. The Commission allowed incumbent LECs either price cap LECs or rate of return LECs to recover the ARC from specified end users, but not CMRS carriers. *Id.* 864 n.1668. Although the ARC was never intended to be revenue neutral, the fact that the Commission provided for a partial transitional recovery mechanism for price cap LECs and rate of return LECs, but not CMRS carriers, further undercuts the view that Section 51.907(g) or (h) apply when the terminating carrier is a CMRS provider (or otherwise not the Price Cap LEC).

[34] *Transformation Order* 1312.

owner does not own the end office.[35] The Commission sought comment on both the transition and the appropriate end state for such intermediate tandem switching services.[36]

E ually important, the Commission e plained that issues relating to these intermediate tandem services are closely related to the issue of how to establish the network edge for purposes of a bill-and-keep rule applicable to such tandem services.[37] In 2011, the Commission concluded that the rules for how bill-and-keep will work for such intermediate tandem charges, and where the network edge is established, could have a substantial and perhaps far-reaching impact on how those services are purchased and provided. The Commission was not ready to resolve those issues based on the record it had accumulated in 2011 indeed, the Commission had received no significant comment on those issues and thus it sought comment on those issues in the *FNPRM* as well.[38]

The Commission recently confirmed that this interpretation of the rule is correct. In its Public Notice seeking to refresh the record in the *FNPRM* on these issues, the Commission e plicitly stated that t he rate transition adopted in the *USF/ICC Transformation Order* reduced tandem switching and transport charges *only when the terminating price cap carrier also owns the*

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[35] *Id*. (emphasis added) *see also id*. 819 (For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. owever, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time.).

[36] *Id.* 1306-10, 1312-13.

[37] *Id*. 1310 (As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the e isting and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport) *id.* 1315-21 (seeking comment on points of interconnection and the network edge in a full bill-and-keep system).

[38] *Id.* 1320-21.

tandem in the serving area. [39] The Commission then stated that i n light of developments that have occurred since the order was adopted, we seek to refresh the record on issues surrounding transition of the *remaining* tandem switching and transport charges to bill-and-keep. [40] And the Commission made clear that it has not decided where the network edge will be set for the traffic at issue reiterating, for e ample, that it still sought comment on whether the network edge should be set at the mobile switching center for wireless traffic and at the media gateway, or trunking media gateway, for VoIP traffic.[41]

The te t of the regulation mandates the same outcome. Rule 51.907(g)(2) provides that e ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than 0.0007 per minute. 47 C.F.R. 51.907(g)(2). The phrase the terminating carrier makes grammatical sense only as a reference back to the Price Cap Carrier *i.e.*, a Price Cap Carrier must phase out its tandem charges when it is the terminating carrier and, as such, owns both the end office and tandem switches.[42] The rule includes the reference to the terminating carrier in part to make clear that transition applies only to the Price Cap Carrier's terminating services, not to originating access. If the terminating carrier could be

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[39] *Tandem Refresh Public Notice* at 2 (emphasis added), citing *Transformation Order* 819 (For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. owever, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time.).

[40] *Tandem Refresh Public Notice* at 2 (Specifically, we seek comment on what steps the Commission should take to transition the remaining elements associated with tandem switching and transport to bill-and-keep.).

[41] *Id.* at 1-2 & n.10.

[42] *Transformation Order* 1312 (Rule 51.907 includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch, but not where the tandem owner does not own the end office (emphasis added)).

a carrier *other* than the Price Cap Carrier (such as a CLEC or a CMRS carrier), then the rule makes no literal sense and, under Level 3's interpretation, would already address many of the more difficult intermediate situations on which the Commission sought comment in the *FNPRM* (and on which it currently has asked for a refreshing of the record in light of developments since 2011).

This understanding of terminating carrier also eliminates any ambiguity with respect to the term affiliate in the regulation. The regulation re uires the Price Cap Carrier to phase out its tandem charges when the terminating carrier or *its* affiliate *i.e.*, the terminating carrier's affiliate owns the tandem. As discussed above, however, the terminating carrier can only be a Price Cap Carrier that owns the end office. Accordingly, the term affiliate comes into play only when the *terminating* price cap carrier that owns the end office has an affiliate that owns the tandem. The *Transformation Order* does not address why the phrase or its affiliates was added to the te t of the regulation indeed, the illustrative chart in the order omits the phrase or its affiliates.[43] The addition was most likely designed either (1) to prevent a Price Cap LEC from trying to evade the tandem transition by transferring its tandem assets to an affiliate, or (2) to cover situations in more rural areas where a price cap LEC's end user is served by the tandem of a neighboring affiliate.

When read in conte t, as is essential, the Rule's meaning is unmistakable: Rule 51.907(g)(2) prescribes a rate transition that reduce s tandem switching and transport charges only when the *terminating price cap carrier* also owns the tandem in the serving area.[44]

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[43] *Cf. id.* 801 & Figure 9 (omitting the phrase or its affiliates).

[44] *Tandem Refresh Public Notice* at 2 (emphasis added).

B. Level 3's Alternative Interpretation Of The Rule Makes No Sense In Terms Of The Language Of The Regulation, The *Transformation Order* And *FNPRM*, Or Sound Policy.

1. Level 3's Interpretation of the Language of the Regulation Is Grammatically Nonsensical.

Level 3's principal argument focuses on the language of the regulation in isolation, ignoring the larger conte t of the *Transformation Order*.[45] And within the regulation, Level 3 focuses on three *terms* in isolation: Price Cap Carrier, terminating carrier, and affiliates. Level 3 argues that each of these terms has a clear and unambiguous meaning that must be given full effect, even if the result is at odds with the Commission's clear intent as e plained in the *Transformation Order*.[46] Level 3's theory founders on its interpretation of terminating carrier, however, for two reasons: (1) Level 3 ignores the grammar of the sentence it is interpreting, and (2) its interpretation of terminating carrier fails on its own terms in all events.

First, Level 3's reading of the regulation is grammatically nonsensical. Level 3 insists that terminating carrier must be treated as a free-floating term that has a well-settled meaning in Commission precedent. [47] According to Level 3, the terminating carrier means *any* carrier that performs end office switching functions, or their e uivalent, and then delivers the call to the called party, whether it is a Price Cap Carrier or not.[48] But if terminating carrier has no relation to Price Cap Carrier, then the regulation's sentence makes no sense. Under Level 3's reading, the

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[45] *See, e.g., Verizon Cal. v. FCC*, 555 F.3d 270, 273 (D.C. Cir. 2009) (The conte t is key, and the Commission understandably . . . looked to the conte t) *Bell Atlantic Tel. Cos. v. FCC*, 131 F. 3d 1044, 1047 (D.C. Cir. 1997) (te tual analysis is a language game played on a field known as conte t.').

[46] Complaint 26-35.

[47] *Id.* 28.

[48] *Id.* 28 *see also id*. 34 (arguing that t erminating carrier' cannot be properly interpreted to mean the same thing as Price Cap Carrier').

regulation literally would say that a Price Cap Carrier may charge 0.0007 per minute for any traffic that traverses the tandem switch of any terminating carrier in the country. In Level 3's own words, a Price Cap Carrier is re uire d to charge 0.0007 or less for all calls traversing the tandem switch where the terminating carrier' which can be anyone *or* its affiliates which can be any affiliate of anyone owns the tandem.[49] Well-settled precedent re uires the Commission to reject any interpretation of the rule that would re uire such patently absurd results.[50]

Level 3 never grapples with the fact that the term terminating carrier appears in a subordinate phrase, set off by commas, that is obviously intended to modify the main clause in the sentence. The term terminating carrier *must* be read as a reference back to the Price Cap Carrier at the beginning of the sentence, or else the sentence makes no sense and conflicts with the *Transformation Order*. The placement of the term terminating carrier within this phrase set off by commas implicitly but *clearly* conveys the meaning that the Price Cap Carrier must charge 0.0007 or less *when it is* the terminating carrier not when any carrier that could be characterized as a terminating carrier, no matter who it is, has traffic traversing its tandem.

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[49] *Id.* 27 (Section 51.907(g)(2) thus applies to LECs that file access charge tariffs pursuant to the Commission's price cap rules and re uires those entities to set the price for tandem-switched transport access service e ual to 0.0007 or less for all calls traversing the tandem switch where the terminating carrier' or its affiliates owns the tandem). Indeed, Level 3's interpretation would lead to the absurd conclusion that all Price Cap Carriers can simultaneously charge for all tandem traffic in the country.

[50] *See, e.g., Cellco P'ship v. FCC*, 357 F.3d 88, 90, 96 (D.C. Cir. 2004) (accepting agency's interpretation of its regulation when it avoid ed absurd results) *AT&T Corp. v. Alpine*, 27 FCC Rcd. 11511, 28 (2012) (as a consistent matter of tariff interpretation, tariffs should be construed to avoid unfair, unusual, absurd or improbable results' (uoting *Penn Cent. Co. v. General Mills*, 439 F.2d 1338, 1341 (8th Cir. 1986))).

In fact, Level 3's interpretation depends on reading the term *affiliates* as a reference back to Price Cap Carrier in the same manner in which AT&T (and the Commission and its Staff) is reading the term terminating carrier. Under Level 3's theory, a terminating carrier can be literally anybody,[51] but Level 3 needs the term affiliate to be understood as limited to the Price Cap Carrier to avoid a nonsensical result. In this way, Level 3 is actually violating its own argument that affiliate is a defined term in the statute that means any entity in common ownership with another. In the conte t of the sentence, however, reading affiliate but not terminating carrier as referring back to the Price Cap Carrier leads to the even more broadly absurd results described above.[52]

Even if Level 3's interpretation made grammatical sense, its argument still fails on its own terms. Indeed, the terminating carrier in the rule cannot include VoIP providers, as Level 3 claims, because VoIP providers are not carriers. In the *Transformation Order*, the Commission e plicitly stated that it was not deciding that VoIP providers are common carriers.[53] Similarly, even when the Commission reclassified broadband Internet access service as common carriage, it made clear that services like AT&T's VoIP services were non-BIAS data services that are not

[51] *See* Complaint 28 (Level 3's definition of terminating carrier encompasses *any* party that performs these functions, no matter what type (emphasis in original)).

[52] Indeed, Level 3's te tual argument holds together *only* in the narrow circumstance in which the Price Cap Carrier is the affiliate that owns the tandem, and *only* if the term affiliate is limited to the Price Cap Carrier rather than any affiliate that meets the statutory definition. Level 3's argument does not hold together if the terminating carrier, which can be anyone, owns the tandem rather than an affiliate. As discussed above, the latter point alone is fatal to its argument, because Level 3 must sensibly account for all circumstances in which the terminating carrier *or* its affiliate owns the tandem which it cannot.

[53] *Transformation Order* 63, 68-69.

part of the common carriage offering.[54] Level 3 cannot have it both ways: if affiliate is to be interpreted according to its statutory definition, then so must carrier. [55]

2. Level 3's Efforts To Explain Away The Discussion In The *Transformation Order* And The *FNPRM* Fail.

Level 3's interpretation is not only incorrect, it improperly treats the Rule as reflecting Commission decisions on issues that in fact are still pending in the *FNPRM*. Level 3's only answer is simply to double down on its nonsensical reading of the regulation. Its argument is, effectively, that because its interpretation of the regulation is correct, then the *FNPRM* must be read to include only topics not covered by Level 3's interpretation.[56] That argument is backwards: the *Transformation Order* and *FNPRM* clearly describe the scope of the rule, and as discussed above, the language of the regulation is perfectly consistent with that description. And, as noted, the Commission itself just reaffirmed in its Public Notice that the scenarios Level 3 thinks are covered

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[54] *Protecting and Promoting the Open Internet,* 30 FCC Rcd. 5601, 35 (2015).

[55] None of the authorities Level 3 cites supports its argument that the use of the term terminating carrier is *this rule* encompasses VoIP providers. *See* Complaint 28 & nn.45-46. The only arguably relevant precedent is *Sprint Commc'ns Co. v. Lozier*, 860 F.3d 1052, 1057 n.4 (8th Cir. 2017), which simply states the general proposition (in a footnote) that Section 251(b)(5) applies to traffic e changed over PSTN facilities that originates and/or terminates in IP format. The mere fact that the statutory framework applies to VoIP traffic *i.e.*, that the Commission has the authority to implement a bill-and-keep regime for such traffic does not establish that the Commission e ercised that authority in the *Transformation Order* as it relates to this price cap LEC tandem traffic. The *Transformation NPRM*, which Level 3 also cites, actually cuts against its argument, insofar as it recognizes that a terminating carrier *in general* can be a rate-of-return carrier, price-cap carrier, competitive carrier, or mobile wireless provider a list that does not include non-carrier VoIP providers. *See Transformation NPRM* 510.

[56] Specifically, Level 3 argues that the *FNPRM* seeks comment only on the situation in which one party owns the end office and an unaffiliated third party owns the tandem. Complaint 54. The *FNPRM* certainly seeks comment on that scenario, but the full discussion in both the *Transformation Order* and the *FNPRM* makes clear that the Commission is still seeking comment on *all* situations in which the tandem owner does not have its own customer. Those situations present fundamentally different issues from the plain-vanilla transition for price cap carriers that own the end office and thus do not have a customer from whom they can recover tandem costs.

by the rule are in fact undecided, and the Commission is currently seeking comment on those issues to refresh the record in the *FNPRM*.

E ually important, however, Level 3's assumption that the intercarrier compensation payments for the tandem services at issue will inevitably be reduced to zero in a bill-and-keep system is not correct. In any bill-and-keep system, there must be a network edge that delineates the point where bill-and-keep applies. [57] In other words, each carrier would be responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge. [58] As the Commission noted in the *FNPRM*, there are numerous options for defining an appropriate network edge, although a consistently prominent proposal in all of the Commission's intercarrier compensation proceedings since 2001 has been to establish the network edge at the terminating central office or its e uivalent.[59] In seeking comment on these issues, the *FNRPM* specifically notes that the Commission had not received significant comment on the network edge issue up to this point. [60]

Level 3's argument assumes that the Commission has already decided that the network edge for the traffic at issue will be placed at the price cap LEC's tandem *i.e.*, that the Price Cap Carrier should be responsible for recovering the costs of the tandem from its CMRS or VoIP

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[57] *FNPRM* 1320.

[58] *Id*.

[59] *Id*. (f or e ample, the edge could be the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway (uotation omitted)). Indeed, proposals to set the network edge at the central office have been at the heart of the Commission's intercarrier compensation proceedings since its original 2001 notice of proposed rulemaking. *See id*. 1320 n.2386 (describing the staff's Central Office Bill And eep proposal in which the calling party's network is responsible for the cost of transporting the call to the called party's central office, citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* (FCC, OPP Working Paper No. 33, Dec. 2000)).

[60] *FNPRM* 1320.

affiliate's end users. But the Commission has not made that decision. Rather, the Commission is still seeking comment on whether the network edge should be placed at the mobile switching center for wireless traffic, and at the media gateway for VoIP traffic.[61] If the Commission ultimately adopts that proposal, then Level 3 would be responsible for delivering the traffic all the way to the mobile switching center or media gateway, and thus would have to pay AT&T for tandem and transport services to deliver the traffic to that network edge.[62] Such tandem charges might not be tariffed in that end-state regime, but it is *not* a forgone conclusion, as Level 3 repeatedly assumes, that a bill-and-keep system necessarily means that the intercarrier compensation payments at issue in this case will be reduced to zero.

The Price-Cap-Carrier-to-affiliate scenarios that Level 3 believes are already covered by the rule in fact pose difficult uestions that the Commission has not resolved. For e ample, reading Rule 51.907(g) to apply to the situation in which a CMRS carrier is the terminating carrier and the Price Cap Carrier is its affiliate that owns the tandem could have substantial unintended conse uences. A price cap LEC would have no practical means of recovering its tandem costs through a CMRS affiliate's end user customer charges. Nor would such a rule be competitively neutral. In Level 3's view, a wireless carrier like AT&T would be e pected to recover its LEC affiliate's tandem costs from its wireless end users, while its wireless competitors that have no LEC affiliates, like T-Mobile and Sprint, would not. Fierce price competition in the wireless marketplace would prevent wireless carriers with LEC affiliates from shifting their tandem costs

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[61] *Tandem Refresh Public Notice* at 2.

[62] *FNPRM* 1320 (carrier would be responsible for carrying, directly or *indirectly by paying another provider*, its traffic to the network edge (emphasis added)).

to their wireless customers.[63] Level 3 has offered no reason why a bill-and-keep scheme should discriminate between wireless carriers based on whether they have a LEC affiliate.

The point is that these are precisely the sorts of issues that the Commission set out to consider and resolve in the *FNPRM*. The *Transformation Order* does not address any of these issues, and the Commission received no significant comment on them.[64] The rule at issue is an access charge rule that is entitled Transition of price cap carrier access charges, and that does not mention non-access providers like CMRS or VoIP providers. Applying this rule to these very different scenarios in which the Price Cap Carrier has no tariffed end user would inappropriately prejudge the *FNPRM* and impose *de facto* bill-and-keep and network edge rules on such traffic. There is simply no basis to interpret this rule to apply to situations that Level 3 concedes constitute a significant and growing portion of the marketplace, when such an interpretation could seriously

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[63] *See, e.g.*, Twentieth Report, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 17-69, 6 (rel. Sept. 27, 2017) Ryan nutson and Joshua Jamerson, *Verizon Customers Defect As Competition Ramps Up*, The Wall Street Journal, at A1 (Apr. 20, 2017) (reintroduction of unlimited data plans has set off a bruising price war), https://www.wsj.com/articles/verizon-for-first-time-loses-core-wireless-customers-1492691308.

[64] Level 3 notes (at 55) that AT&T previously uoted the Commission's statement that commenters had e press ed concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office . . ., but it claims that the Commission was referring to NCTA comments that e pressed concern about removing *ex ante* rate regulation from tandem and transport services. It is important, however, to place these various comments in conte t. None of the party proposals the Commission was considering in 2011, including both the industry ABC Plan and NCTA's Amended ABC Plan, actually proposed a transition to end-state bill-and-keep for terminating traffic, but rather proposed a transition to a uniform transport and termination rate (0.0007) pursuant to Section 251(b)(5). Moreover, none of those proposals specifically addressed or discussed the situation in which the Price Cap Carrier owns the tandem and a CMRS or VoIP affiliate owns the end office or e uivalent facilities. And, notably, NCTA's Amended ABC Plan specified that carriers like Level 3 would pay the full transport and termination rate to *both* the tandem owner *and* the end office owner when the two carriers were different NCTA's principal concern was simply that the tandem rate remain regulated. *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Comments of NCTA, Attachment at 8-9.

distort competition with no real opportunity for the Commission to consider the possible conse uences in a rulemaking.

3. Level 3's Policy Arguments Are Irrelevant And Also Misguided.

Level 3 also claims that the Commission's reading of the rule undermines the Commission's policy objectives. These claims are both mistaken and largely beside the point.

In the *Transformation Order*, the Commission did not set out to address every issue or transition every element of the current system to bill-and-keep. *See supra*, Background. Rather, the Commission consciously pursued a piecemeal approach. *Id*. The *Transformation Order* merely began the transition by focusing on the easiest and most obvious scenarios, which involved certain kinds of terminating traffic. In adopting this partial transition, the Commission had to draw lines: it established a transition for some scenarios but not others. *Transformation Order* 809.

In this particular instance, the Commission chose to adopt a transition for a price cap LEC's tandem charges when that LEC also owns the end office, which would apply in ears 6 and 7 of the transition.[65] The Commission left the uestion of how to deal with all other tandem charges, including all such charges when the terminating carrier is a wireless or VoIP provider, to the *FNPRM*. The Commission's decision to start with the first scenario was based entirely on the relative comple ity of the issues involved and the state of the record it did not reflect any particular policy decision relating to the tandem services in one scenario versus another. Indeed, the Commission has not yet made any policy decisions about the issues on which it has sought further comment in the *FNPRM* that is why those issues are in the *FNPRM*. Moreover, the Commission's piecemeal approach to tandem charges was not problematic when the Commission adopted the

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[65] As discussed above, this transition also applies to functionally e uivalent arrangements of a CLEC by operation of the pre-e isting CLEC access charge rules.

Transformation Order, because at that time the Commission had *five years* to complete the *FNRPM* before any transition relating to tandem charges would begin, and it e pected to complete the *FNPRM* before then.

To the e tent that the limited scope of the transition for tandem services in Rule 51.907(g) creates gaps in the Commission's policies *today*, that is an artificial result of the fact that the Commission has never acted in the *FNPRM*. This is unfortunate but not unlawful.[66] It is well-settled that the Commission can choose which problems it wants to tackle and in what order no one could have claimed in 2011, when the Commission adopted this limited rule, that its decision to proceed in a piecemeal fashion was arbitrary. *Transformation Order* 809.

E ually important, the fact that the Commission has not resolved the *FNPRM* has no uniform effect on carriers like Level 3, and indeed, Level 3 is ignoring the broader conte t of the transition. Many of the initial steps the Commission took in the initial portion of the transition such as the applicable step-downs for intrastate access services, for terminating end office service, and the tandem step down applicable when the price cap carrier owns the tandem and the end office provide substantial benefits to access customers, including Level 3. At the same time, the Commission determined that it should *not* immediately reduce rates for other categories of access service and terminating tandem services where the price cap carrier does not hand off to a price cap end office. The Commission's decision to delay the transition for these other access services might mean that purchasers of the services pay more than they otherwise would if the Commission had included them in the initial transition, but the Commission found that outcome necessary. It e plained that its overall initial transition sought to strike the right balance between

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[66] Contrary to Level 3's insinuations, AT&T has been vigorously arguing for some time that the Commission should resolve the *FNPRM* and complete the transition to the end-state bill-and-keep. *See, e.g.*, Forbearance Petition at 3.

our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes, while furthering the goal of overall reform. *Id*. 802 *see also Transformation NPRM*, 555 (a more rapid or immediate transition would both complicate universal service reform and add to the comple ity of issues that need to be addressed earlier in the transition process, as compared to an approach that deferred certain types of rate reductions until later in the process.). Level 3 not only ignores this attempt to strike the right balance, it ignores the fact that CLECs like Level 3 also benefit greatly from the Commission's decision to postpone consideration of this latter set of issues, particularly as they relate to originating access services and 8 traffic.[67]

For these reasons, all of Level 3's policy arguments are misdirected. Level 3 makes a series of policy arguments as if the uestion in this case is whether the Commission *should* adopt Level 3's position. But the only uestion in this case is which issues the Commission already addressed in the 2011 *Transformation Order*, and which ones it left for the *FNPRM*. This case does not call upon the Commission to make any policy judgments Level 3's policy arguments are more properly addressed to the Commission in the *FNPRM*. The proper course for resolving these lingering issues is to complete the *FNPRM* e peditiously, as the Commission now seems to be doing not to misconstrue and misapply Rule 51.907(g) (and thereby prejudge those issues without a full, industrywide record).[68]

In all events, as discussed above, it is not a forgone conclusion that the Commission will agree with Level 3 in the *FNPRM*, because there are policy arguments on both sides. Level 3's

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[67] *See Connect America Fund, et al*., WC Docket Nos. 10-90, *et al*., Comments of AT&T, at 7-8, 10-12 (filed July 31, 2017) (describing CLEC methods of e ploiting arbitrage opportunities in the conte t of originating access for 8 calls).

[68] AT&T Opp. To Stay Petition at 14 n.14 AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T's Tariff Filings, at 5 n.11 (filed Jun. 20, 2017) *see also* AT&T Forbearance Petition at 3.

main argument stems from its observation that traffic from legacy TDM networks is increasingly shifting to wireless and VoIP networks. Level 3 insists that the Commission's interpretation of the rule, which does not reach these forms of traffic, undermines the *Transformation Order*'s objectives, meaning the objective of a completed transition to a bill-and-keep system.[69] The rule does not undermine the Commission's objectives at all. The rule is an initial step a down payment on a completed bill-and-keep scheme and it fully resolves the subjects it addresses. Again, Level 3 is simply frustrated that the Commission has not yet completed the follow-on *FNPRM* that would resolve the issues Level 3 is raising now, and the seriousness of those issues is a reason for the Commission to resolve the *FNPRM* e peditiously.

Even if Level 3's policy arguments were relevant, none of Level 3's four specific policy arguments support its position.[70] Level 3's first and fourth arguments make essentially the same point: that AT&T's tandem charges for the traffic at issue allegedly harm competition for downstream services, by which Level 3 apparently means competition for long-distance customers on the originating end of such calls.[71] Level 3 claims that AT&T's tandem charges are inflated and thus give it a competitive advantage over competitors like Level 3, to the e tent that Level 3 purchases such services as an input.

Level 3's argument is misguided. AT&T's tandem charges are regulated under price caps and presumptively lawful. Level 3 also has many competitive alternatives to AT&T's tandem and

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[69] Complaint 38 (b y improperly shielding the rising tide of VoIP- and CMRS-terminated calls from bill-and-keep, AT&T is artificially inflating tandem-switched access service costs . . .).

[70] *See id.* 40-44. Notably, the Commission sought comment on transitioning *the remaining rate elements* consistent with our bill-and-keep framework the *FNPRM* notwithstanding the fact that commenters had made many of the same policy arguments Level 3 is making now. *See FNPRM* 1297.

[71] Complaint 40, 44 Declaration of Edwin Stocker, 13, 16 (attached as E hibit 9 to Level 3's Complaint) (Stocker Decl.).

transport services, as the record in the *Intercarrier Compensation* proceeding showed even five years ago.[72] But even if those two points were not true, the rule at issue applies systemically across the industry. All originating carriers, including AT&T, pay the same legacy tandem charges when their customers make long-distance calls that terminate on other wireless or VoIP networks. Indeed, AT&T often pays those tandem charges to Level 3 itself. Although the Commission's end-state bill-and-keep regime for tandem charges will likely be more efficient than the current scheme on an overall basis, the fact that all competitors pay the same tandem charges in the same situations, pending the completion of the *FNPRM*, largely eliminates Level 3's concern about undue competitive advantages.

In addition, the magnitude of the effects Level 3 claims are unlikely to have any material effect on competition or broadband investment. Level 3 argues that it is paying a specified amount more per month than it would if AT&T had applied the ear Si step-down to reduce the tandem charges at issue to 0.0007 per minute. It claims that monthly amount will rise over the course of the ne t two years, although that is based mostly on the assumption that AT&T's rate would otherwise have been reduced to zero in ear Seven.[73] In the multi-billion dollar telecommunications marketplace, these amounts are simply too small to change the course of competition in any meaningful way. And that would be true even if the Commission ultimately agrees with Level 3's position that these charges should be transitioned to zero which, as discussed above, it may not.

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[72] *See, e.g., Connect America Fund, et al*., WC Docket Nos. 10-90 *et al*., Reply Comments of AT&T, at 40-41, 45-49 (filed March 30, 2012).

[73] Complaint 41 Stocker Decl. 7. It is also based partly on assumptions about the e pected growth of wireless traffic and the fact that calls to VoIP and CLEC customers are declining more slowly than calls to Price Cap LEC end offices. Complaint 41 & n.70.

Level 3's second claim is that, because AT&T can collect these tandem charges only for traffic e changed in TDM format, maintaining higher tandem rates gives AT&T a strong incentive to maintain TDM-based interconnection arrangements instead of transitioning to IP-to-IP interconnection.[74] Once again, this concern, to the e tent it applies, applies to all tandem charges on which the Commission has sought comment in the *FNPRM*, including any arrangements that Level 3 has with affiliated or unaffiliated wireless or VoIP providers. The rulemaking proceeding gives the Commission the opportunity to resolve these issues on a competitively neutral basis rather than applying different rules depending on whether the wireless or VoIP provider has a LEC affiliate or not.

Finally, Level 3 suggests that the disparity in rates may give carriers an incentive to engage in wasteful schemes designed to ma imize traffic subject to the higher rates. It offers no e amples of how such a scheme might work. The argument is in fact e tremely dubious, given that AT&T has no choice but to route the call to the provider who has the customer that the *originating caller* has decided to call. AT&T would have no ability to manipulate those routing decisions to increase traffic bound for its wireless or VoIP affiliates.[75]

II. THE COMMISSION SHOULD RULE FOR AT&T ON BOTH COUNTS IN THE COMPLAINT.

A. Count I, Section 201(b).

[74] *Id*. 42 Stocker Decl. 14.

[75] By contrast, as AT&T showed in its Forbearance Petition, the Commission's rules are allowing wasteful arbitrage schemes, like access stimulation, to continue to flourish and inaction on originating access reform has encouraged schemes as to those charges. Rather than adopt a bizarre construction of Rule 51.907(g) to combat phantom access arbitrage schemes, the Commission should act forcefully to stop carriers from engaging in actual unreasonable practices.

In Count I, Level 3 alleges that AT&T's tariff filing is an unreasonable practice under Section 201(b) of the Act. Compl. 58-64. For all the reasons just e plained, this Count is meritless and should be dismissed.

The interpretation of Rule 51.907(g) adopted by AT&T, all other price cap LECs, the Commission Staff, and the Commission itself is the most reasonable interpretation. That interpretation is compelled not only by the te t of Rule 51.907, which applies to price cap carriers, but by the Commission's e planation in the *Transformation Order* of its initial transition. There, the Commission e plained that, while it was adopting a limited transition for tandem services when the price cap carrier owned the tandem and end office, it was not deciding issues about the network edges (because it lacked an ade uate record, *id.* 1320) or the closely related issue of the the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office (because commenters had e pressed concerns that the Commission was not yet prepared to resolve), *id.*, 1310, 1312. Because the Commission is still deciding the remaining transition and where to place the network edge and may ultimately decide that, on wireless calls for e ample, the network edge could be the location of the called party's . . . mobile switching center, *see Tandem Refresh Notice*, n.10 Level 3's interpretation of Rule 51.907(g) is unreasonable. Under Level 3's view, the Commission has repeatedly sought comment on transition issues that it supposedly already decided within the plain terms (Compl. 61) of Section 51.907(g). That is incorrect, and the interpretation adopted by AT&T, the Staff, and the Commission is far more consistent with the te t of Rule 51.907(g) and the purposes of the Commission's initial multi-year transition.

In any event, Count I also fails because AT&T did nothing unreasonable and certainly did not violate Section 201(b) by implementing the interpretation of Rule 51.907(g) adopted by the Commission (*Tandem Refresh Notice*, at 2), its Staff, and other price cap carriers. Although Level 3 is correct that the Commission implements and enforces Section 201(b)'s just and reasonable' re uirement through various rules and regulations, Compl. 60, Level 3 ignores that the Commission and its Staff, to date, have refused to implement Section 201(b) in the manner advocated by Level 3. To the contrary, AT&T and other price cap carriers filed tariffs, on a streamlined basis pursuant to Section 204(a)(3), that reflected the current implementation of Section 201(b) and Rule 51.907(g) by the Commission and its Staff. There is nothing unreasonable or unjust in doing so. While the Commission can change its interpretation prospectively if it provides an appropriate and lawful rationale, Level 3 provides no e planation that would justify a finding that AT&T either violated Section 201(b) or must be liable retroactively, when it merely followed the e isting guidance from the Commission and its Staff as to how Rule 51.907(g) and Section 201(b) should be implemented.[76]

B. Count II—Section 202(a).

In Count II, Level 3 alleges that AT&T's tariffs implementing Rule 51.907(g) are unreasonably discriminatory. Compl. 65-70. This Count is also meritless and should be dismissed.

For all the reasons e plained above, the Commission and its Staff have reasonably determined that the services that are subject to the step-down in Rule 51.907(g) tandem services when the price cap carrier owns the tandem and the end office are not like the other tandem

[76] Although Level 3 asserts a right to damages and full refund, *e.g.,* Complaint 64, there should be no damages phase because AT&T has not violated the Act or any Commission rule. In any event, if any damages phase were permitted, AT&T would have substantial defenses, including but not limited to defenses based on the due process clause and Section 204(a)(3), that any damages are unlawful and improper. The same defenses would apply to any damages or refund claim asserted under Section 202(a), *see* Complaint 70, 71.

services (including tandem services when a price cap carrier hands off traffic to a wireless carrier, VoIP provider, competitive LEC, or any third party) that are not included within the initial transition. When the price cap LEC owns the tandem and an end office, the price cap carrier's recovery can be handled entirely within the e isting access charge regime. In the other cases, the Commission has determined that the appropriate intercarrier compensation to be paid, if any, needs to be decided in conjunction with other issues like the network edge. Because AT&T's tariff (and the tariffs of all other price cap carriers) follow the Commission's reasonable determinations in adopting its partial transition, the services at issue are not like' services, and there is no unreasonable discrimination within the meaning of Section 202(a).

Level 3's Section 202(a) claim is, at bottom, an attempt to second-guess the Commission's judgments in 2011 as to how best to implement a partial transition, one in which only certain rate elements would transition and others would be addressed, along with other issues, at a later time after receiving additional comment. Once the Commission decided to adopt a phased and partial transition, the Commission necessarily had to decide what rate elements would be part of the initial transition and the pace of that transition. *See Transformation Order* 809 (Specifying the timing and steps for the transition to bill-and-keep re uires us to make a number of line-drawing decisions. Although we could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike.).

Level 3 does not challenge the Commission's general authority to draw those lines if it were making such a challenge, then Level 3 should have raised it back in 2011 when the Commission announced its transition. In fact, Level 3's own preferred interpretation of the transition and of Rule 51.907(g) is not that all access services, or even all tandem and transport services, are subject to the same transition and step-downs. For instance, Level 3 asserts that third-party tandem traffic should be e cluded from the initial transition in Rule 51.907(g) and billed at higher rates. *See, e.g.*, Level 3 Tariff, 15.1.3.4.5.2 (charging rates above 0.0007 for tandem switching Terminating To 3rd Party). Level 3 fails to e plain why that distinction does not implicate Section 202(a).[77] Further, Level 3's position is that, under Rule 51.907(g), AT&T and other price cap LECs should charge 0.0007 per minute for tandem services when AT&T's price cap LEC uses a tandem to terminate a call to AT&T Mobility, but should charge a higher rate when that LEC terminates a call to any unaffiliated wireless carrier. ere again, Level 3 makes no effort to e plain why this difference in price would not also violate Section 202(a) under its theory in fact, as e plained above, such an interpretation of Rule 51.907(g) would raise concerns about competitive neutrality, and those concerns were one of the reasons why the Commission decided to seek further comment rather than transition all tandem services to bill-and-keep as the default regime.

As such, Level 3's position is not that different tandem rates are unreasonably discriminatory, but is instead an argument that the Commission should have drawn the lines in its initial transition differently than it did. But that challenge which should have been raised, if at

[77] The evidentiary support cited by Level 3 for its 202(a) claim (Complaint 68 n.107 (citing Stocker Decl. 4)) is a single paragraph in a declaration asserting that the tandem-switched transport access that Level 3 purchases on calls that terminate in AT&T's incumbent LEC territory is the same tandem-switched transport access services under the same tariffs and consisting of the same network functionalities as when calls are terminated to wireless or other AT&T affiliates. Stocker Decl. 4. owever, Level 3's own tariff offers Switched Transport including tandem switching at two different rates one for terminating to a third party and a lower rate for terminating to a Level 3 end office. Level 3 Tariff, 15.1.3.4.5.2 (third party), 15.1.3.4.5.3 (Level 3 end office). Thus, despite Level 3's arguments here, Level 3 customers buy the same tandem switched transport access services under the same tariff but pay different rates, depending on whether the Level 3 tandem hands off a call to a Level 3 end office or to a third party. Nothing in the Level 3 tariff e plains how these tandem switching services Level 3 provides have different network functionalities. As such, if the tariffs of price cap carriers violate Section 202(a), then so too does the tariff filed by Level 3.

all, back in 2011 is necessarily more limited, and Level 3 does not come close to establishing that the Commission's judgments as to how it drew the lines in order to establish its initial transition, or the step-downs in Rule 51.907(g) are arbitrary or unlawful. To the contrary, as AT&T has e plained, the Commission reasonably determined that the situation in which a price cap carrier hands off a call to a price cap end office presented the most straightforward case for the initial transition to bill-and-keep as the default regime and, that other instances, including third-party traffic and traffic to price cap wireless affiliates, entailed more difficult policy uestions that should be deferred and resolved along with network edge issues.

CONCLUSION

For the foregoing reasons, the Commission should reject Level 3's claims and dismiss the Complaint.

Respectfully submitted,

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Dated: October 10, 2017

Counsel for AT&T Corp.

EXHIBIT 5

Formal Complaint of Level 3 Communications, LLC,
Level 3 Commc'ns, LLC v. AT&T, Inc.,
33 FCC Rcd 2388 (F.C.C. Feb. 12, 2018) (No. 17-227)

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC, Complainant, v. AT&T INC., BELLSOUTH TELECOMMUNICATIONS, LLC, NEVADA BELL TELEPHONE COMPANY, PACIFIC BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE, L.P., ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, OHIO BELL TELEPHONE COMPANY, AND WISCONSIN BELL TELEPHONE COMPANY, Defendants.	EB Docket No. 17-227 File No. EB-17-MD-003

FORMAL COMPLAINT OF LEVEL 3 COMMUNICATIONS, LLC

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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Level 3 Communications, LLC v. AT&T Inc. et al.,* EB Docket No. 17-227, File No. EB-17-MD-003

Dear Ms. Dortch:

Level 3 Communications, LLC ("Level 3") submits for filing the Public Version of its Formal Complaint ("Complaint") against AT&T Inc., Bellsouth Telecommunications, LLC, Nevada Bell Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone, L.P., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell Telephone Company (collectively, "AT&T"). Consistent with the Commission's rules[1] and the Protective Order entered by the Commission's Enforcement Bureau on August 31, 2017,[2] this Public Version is being filed on ECFS.

Level 3 is filing by hand with the Secretary's office a copy of the Confidential Version of the Complaint. In addition, copies of the Confidential and Public Versions of the Complaint are being served on counsel for AT&T.

Please contact me if you have any questions regarding this matter.

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[1] 47 C.F.R. §§ 1.731, 1.735.

[2] Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, EB Docket No. 17-227, File No. EB-17-MD-003 (Aug. 31, 2017).

Respectfully submitted,

Thomas Jones
Counsel for Level 3 Communications, LLC

Enclosures

cc: Rosemary McEnery
Lisa Saks
Lisa Boehley

FCC 485
November
2014

Federal Communications Commission
Washington, D.C. 20554

OMB Control Number
3060-0411

SECTION 208 FORMAL
COMPLAINT INTAKE FORM

1. Case Name: Level 3 Communications, LLC v. AT&T Inc. et al., EB Docket No. 17-227, File No. EB-17-MD-003

2. Complainant's Name, Address, Phone and Facsimile Number, e-mail address (if applicable):
Level 3 Communications, LLC, 1220 L Street NW, Suite 6600, Washington, DC 20005 (571) 730-6533

3. Defendant's Name, Address, Phone and Facsimile Number (to the extent known), e-mail address (if applicable):
AT&T Inc., 1120 20th Street NW, Suite 1000, Washington, DC 20036 (202) 463-4148

4. Complaint alleges violation of the following provisions of the Communications Act of 1934, as amended:
Sections 201(b) and 202(a)

Answer (Y)es, (N)o or N/A to the following:

Y 5. Complaint conforms to the specifications prescribed by 47 C.F.R. Section 1.734.

Y 6. Complaint complies with the pleading requirements of 47 C.F.R. Section 1.720.

Y 7. Complaint conforms to the format and content requirements of 47 C.F.R. Section 1.721, including but not limited to:

Y a. Complaint contains a complete and fully supported statement of facts, including a detailed explanation of the manner in which the defendant is alleged to have violated the provisions of the Communications Act of 1934, as amended, or Commission rules or Commission orders.

* b. Complaint includes proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the Complaint.

Y c. If damages are sought in this Complaint, the Complaint comports with the specifications prescribed by 47 C.F.R. Section 1.722(a), (c).

Y d. Complaint contains a certification that complies with 47 C.F.R Section 1.72l(a)(8), and thus includes, among other statements, a certification that: (1) complainant mailed a certified letter outlining the allegations that formed the basis of the complaint it anticipated filing with the Commission to the defendant carrier; (2) such letter invited a response within a reasonable period of time; and (3) complainant has, in good faith, discussed or attempted to discuss, the possibility of settlement with each defendant prior to the filing of the formal complaint.

Y e. A separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or the same set of facts stated in the Complaint, in whole or in part. If yes, please explain:
Level 3 filed a Petition to Reject or Suspend and Investigate on June 23, 2017. CenturyLink and Sprint also filed related petitions further detailed in Paragraph 7 of the Complaint.

N f. Complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission. If yes, please explain:

* g. Complaint includes an information designation that contains:

* (1) A complete description of each document, data compilation, and tangible thing in the complainant's possession, custody, or control that is relevant to the facts alleged with particularity in the Complaint, including: (a) its date of preparation, mailing, transmittal, or other dissemination, (b) its author, preparer, or other source, (c) its recipient(s) or intended recipient(s), (d) its physical location, and (e) its relevance to the matters contained in the Complaint; and

* (2) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the Complaint, along with a description of the facts within any such individual's knowledge; and

* (3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations. and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information.

Y h. Attached to the Complaint are copies of all affidavits, tariff provisions, written agreements, offers, counter-offers, denials, correspondence, documents, data compilations, and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the Complaint.

Y i. Certificate of service is attached and conforms to the specifications prescribed by 47 C.F.R. Sections 1.47(g) and 1.735(f).

j. Verification of payment of filing fee in accordance with 47 C.F.R. Sections 1.721(13) and 1.1106 is attached.

N/A 8. If complaint is filed pursuant to 47 U.S.C. Section 271(d)(6)(B), complainant indicates therein whether it is willing to waive the 90-day complaint resolution deadline.

* = The Enforcement Bureau approved the parties' agreement to waivers of certain rules for purposes of this proceeding, including: 47 C.F.R. §§ 1.721(a)(6), 1.724(c), 1.726(c) governing the submission of proposed findings of fact and conclusions of law; and 47 C.F.R. §§ 1.721(a)(10), 1.724(f), 1.726(d) governing the submission of information designations. See Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, EB Docket No. 17-227, File No. EB-17-MD-003 (Aug. 31, 2017).

__Y__ 9. All reported FCC orders relied upon have been properly cited in accordance with 47 C.F.R. Sections 1.14 and 1.720(i).

__**__ 10. Copy of Complaint has been served by hand-delivery on either the named defendant or one of the defendant's registered agents for service of process in accordance with 47 C.F.R. Section 1.47(e) and 47 C.F.R. Section 1.735(c).

__Y__ 11. If more than ten pages, the Complaint contains a table of contents and summary, as specified in 47 C.F.R. Section 1.49(b) and (c).

__Y__ 12. The correct number of copies required by 47 C.F.R. Section 1.51(c), if applicable, and 47 C.F.R. Section 1.735(b) have been filed.

__Y__ 13. Complaint has been properly signed and verified in accordance with 47 C.F.R. Section 1.52 and 47 C.F.R. Section 1.734(c).

__N/A__ 14. If Complaint is by multiple complainants, it complies with the requirements of 47 C.F.R. Section 1.723(a).

__Y__ 15. If Complaint involves multiple grounds, it complies with the requirements of 47 C.F.R. Section 1.723(b).

__Y__ 16. If Complaint is directed against multiple defendants, it complies with the requirements of 47 C.F.R. Section 1.735(a)-(b).

__Y__ 17. Complaint conforms to the specifications prescribed by 47 C.F.R. Section 1.49.

** = The Enforcement Bureau approved the parties' agreement to email service of the Complaint. See Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, EB Docket. No. 17-227, File No. EB-17-MD-003 (Sept. 11, 2017).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC, Complainant, v. AT&T INC., BELLSOUTH TELECOMMUNICATIONS, LLC, NEVADA BELL TELEPHONE COMPANY, PACIFIC BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE, L.P., ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, OHIO BELL TELEPHONE COMPANY, AND WISCONSIN BELL TELEPHONE COMPANY, Defendants.	EB Docket No. 17-227 File No. EB-17-MD-003

FORMAL COMPLAINT OF LEVEL 3 COMMUNICATIONS, LLC

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September 12, 2017

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TABLE OF AUTHORITIES

CASES

STATUTES

COMMISSION ORDERS

1. Pursuant to Sections 201, 202, 205, 206, 207, and 208 of the Communications Act ("Act"), 47 U.S.C. §§ 201, 202, 205, 206, 207, and 208, and Sections 1.720 *et seq*. of the rules of the Federal Communications Commission ("Commission"), 47 C.F.R. §§ 1.720 *et seq*.,[1] Complainant Level 3 Communications, LLC ("Level 3") brings this Formal Complaint against Defendant AT&T Inc. and its Price Cap Carrier subsidiaries, BellSouth Telecommunications, LLC ("BellSouth"), Nevada Bell Telephone Company ("Nevada Bell"), Pacific Bell Telephone Company ("PacBell"), Southwestern Bell Telephone, L.P. ("Southwestern Bell"), and the "Ameritech Operating Companies," which include Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell Telephone Company (collectively, "AT&T") alleging violations of Sections 201(b) and 202(a) of the Act, and states in support as follows.

[1] Level 3 and AT&T agreed to waive the following rules for purposes of this proceeding: 47 C.F.R. §§ 1.721(a)(6), 1.724(c), 1.726(c) governing the submission of proposed findings of fact and conclusions of law; 47 C.F.R. §§ 1.721(a)(10), 1.724(f), 1.726(d) governing the submission of information designations; and 47 C.F.R. § 1.729 governing discovery, which the parties agreed not to request. Letter from Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, to Rosemary McEnery, Chief, Market Disputes Resolution Division, *et al*., EB Docket No. 17-227, File No. EB-17-MD-003 (Aug. 25, 2017) (attached as Exhibit 5). The staff of the Enforcement Bureau's Market Disputes Resolution Division approved this waiver agreement on August 31, 2017. Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, EB Docket No. 17-227, File No. EB-17-MD-003 (Aug. 31, 2017) (attached as Exhibit 6). Accordingly, this Complaint does not include (1) a document setting forth proposed findings of fact and conclusions of law, (2) an information designation, or (3) discovery requests. The parties also sought a limited waiver of 47 C.F.R. § 1.720(f) governing submission of non-Commission authorities, and waiver of 47 C.F.R. § 1.735(c) requiring complaints to be served by hand delivery. Letter from Thomas Jones, Counsel for Level 3, and Michael J. Hunseder, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, EB Docket No. 17-227, File No. EB-17-MD-003 (Sept. 7, 2017) (attached as Exhibit 7). The Commission staff approved this request on September 11, 2017. Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher Shenk, Counsel for AT&T, EB Docket No. 17-227, File No. EB-17-MD-003 (Sept. 11, 2017) (attached as Exhibit 8). Therefore, Level 3 includes an excerpt of a non-Commission authority as Exhibit 15 and will serve the Complaint on AT&T counsel via email.

INTRODUCTION AND SUMMARY

2. This dispute arises out of efforts by AT&T to delay and impede intercarrier compensation (or "ICC") reform. In Section 51.907(g)(2) of its rules, the Commission has unambiguously required that AT&T and other "Price Cap Carriers" transition to bill-and-keep for tandem-switched transport access services for calls that traverse a tandem switch that is owned by the "terminating carrier" or its "affiliates." This encompasses traffic that traverses a tandem switch owned by an AT&T Price Cap Carrier and terminates with an AT&T affiliate, whether it is an AT&T ILEC, CLEC, VoIP provider, or wireless carrier. By promulgating the rule in this way, the Commission ensured that calls terminated by VoIP and wireless providers, which comprise a rapidly-growing percentage of voice calls traversing Price Cap Carrier tandem switches, are part of the transition to bill-and-keep.

3. Rather than comply with Section 51.907(g)(2), AT&T has rewritten the regulation to apply only if a call traverses a tandem switch owned by a Price Cap Carrier and the Price Cap Carrier is also the "terminating carrier." As for the term "affiliates" in the rule, AT&T contends that it too only "comes into play" when the Price Cap Carrier that owns the end office has an affiliate that owns the tandem. Based on this self-serving reformulation of Section 51.907(g)(2), AT&T has filed Step Six tariff revisions that (a) only comply with the rule's rate cap for a shrinking percentage of calls that terminate with an AT&T Price Cap Carrier, and (b) charge rates as much as two-and-a-half times the maximum rate permitted under the Commission's rules for the growing percentage of calls that terminate with an AT&T VoIP or wireless carrier, thereby perpetuating the very ICC inefficiencies that the regulation is intended to end. AT&T's tariffs are unlawful, contravene the Commission's policy objectives, and harm Level 3 and other competitive providers to the detriment of customers.

JURISDICTION

4. The Commission has jurisdiction over this Complaint under Section 208 of the Act, 47 U.S.C. § 208. AT&T, through its subsidiaries at issue, is a common carrier, 47 U.S.C. § 153, subject to the requirements of Title II of the Act, including Sections 201, 202, 205, 206, 207, and 208.

DAMAGES AND BIFURCATION

5. Level 3 requests damages for AT&T's unlawful, unreasonable, and discriminatory conduct, including for amounts Level 3 paid in excess of the lawful rate and consequential damages.

6. Pursuant to 47 C.F.R. § 1.722(d), Level 3 requests that the Commission first adjudicate the issues related to liability, and then determine Level 3's damages in a separate and subsequent proceeding.

PRIOR RELATED ACTIONS

7. Pursuant to 47 C.F.R. § 1.721(a)(9), Level 3 notes that it filed a Petition to Reject or Suspend and Investigate the AT&T tariff filings at issue.[2] This Complaint is based on many of the same facts. Three other proceedings pending before the Commission address matters that could relate, in part, to some of the same issues here, including: (1) Petition of CenturyLink to Stay Steps 6 and 7 of ICC Transformation Order; (2) Petition of Sprint to Reject or Suspend and Investigate; and (3) Petition of CenturyLink to Reject or Suspend and Investigate.[3]

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[2] Petition of Level 3 to Reject or Suspend and Investigate, WC Docket No. 17-65 (filed June 23, 2017) (attached as Exhibit 13); *see also Protested Tariff Transmittals – No Actions Taken*, Public Notice, 32 FCC Rcd. 5500 (WCB 2017).

[3] CenturyLink's Petition for Limited Stay of Transformation Order Years 6 and 7 ICC Transition – As It Impacts a Subset of Tandem Switching and Transport Charges, WC Docket No. 10-90 *et al.* (Apr. 11, 2017); Petition to Reject, or in the Alternative Suspend and Investigate, of Sprint Corporation, WC Docket No. 17-65 (June 23, 2017); Petition of CenturyLink Communications,

THE PARTIES

8. Complainant Level 3 is a Delaware corporation that provides communications and other services. Its principal place of business is Broomfield, Colorado. This Complaint relates to Level 3's role as an interconnecting carrier and purchaser of AT&T's tandem-switched transport access services.

9. Defendant AT&T is a Delaware corporation with its principal place of business in Dallas, Texas. For purposes of this Complaint, AT&T, through its ILEC subsidiaries, the Ameritech Operating Companies, BellSouth, Nevada Bell, PacBell, and Southwestern Bell, is operating as a common carrier, and specifically as a Price Cap Carrier, that is subject to the Act. Additionally, relevant to this Complaint are AT&T's common carrier functions as a competitive local exchange carrier ("CLEC") and a commercial mobile radio services ("CMRS" or "wireless") carrier, and its function as a provider of voice over Internet Protocol ("VoIP") services.[4]

THIS IS A FIVE-MONTH COMPLAINT

10. This Complaint relates to the "lawfulness of a charge, classification, regulation, or practice," and the Commission is required to "issue an order concluding [its] investigation within 5 months after the date on which the complaint was filed."[5] Specifically, Level 3 claims that AT&T's tariffs for tandem-switched transport access services are unlawful, unjust, and

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LLC to Reject and to Suspend and Investigate AT&T Tariff Filings (June 14, 2017); *see also* AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T Tariff Filings (June 20, 2017) ("AT&T Opp'n to CenturyLink").

[4] *See* 47 C.F.R. § 51.913(a), (b) (establishing access charges for VoIP providers and other competitive local exchange carriers).

[5] 47 U.S.C. § 208(b)(1).

unreasonable, which makes this Complaint subject to the five-month statutory deadline under Section 208(b)(1).[6]

FACTUAL BACKGROUND AND LEGAL ANALYSIS

I. INTERCARRIER COMPENSATION AMID TECHNOLOGY TRANSITIONS

A. Calls traversing tandem switches increasingly terminate with non-ILECs.

11. As the Commission has observed, over the past decade, "demand for traditional telephone service [has] fall[en], with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives."[7] In 2015, the Commission reported that "'almost 75 percent of U.S. residential customers (approximately 88 million households) no longer receive[d] telephone service over traditional copper facilities'"; and by USTelecom's estimate, only 16 percent of households retained incumbent LEC ("ILEC") switched access by the end of 2015.[8]

12. These trends follow for AT&T. In March 2016, AT&T stated that "our analysis now shows that by the end of 2015 the number of switched ILEC access lines in AT&T's ILEC

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[6] *See Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd. 22497 ¶¶ 32-37 (1997).

[7] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶ 648 (2011) ("*Transformation Order*" or, where appropriate, "*FNPRM*"), *aff'd sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

[8] *Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd. 8283 ¶ 16 (2016) (citation omitted) ("*Technology Transitions Declaratory Ruling*").

states had fallen 83.4 percent [from 1999 levels] and that only about 14 percent of housing units in AT&T's ILEC region would subscribe to traditional voice services provided by an ILEC."[9] AT&T concluded that "[t]he very large, and increasing, number of consumers that have abandoned ILECs' traditional voice telephone services in favor of wireless and interconnected VoIP services shows that consumers themselves consider these alternatives to be competitive substitutes for ILEC switched voice services."[10] AT&T also reported that the same precipitous trend is present in the business market.[11]

13. VoIP subscriptions have shown explosive growth. Commission data indicate that between December 31, 2010 and June 30, 2016, the total number of U.S. VoIP subscribers nearly doubled, from 31.6 million[12] to 60.3 million.[13] Mobile wireless also continues to grow nationwide, from approximately 300 million subscriptions in 2011 to 396 million at the end of 2016.[14]

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[9] Reply Comments of AT&T Services, Inc., WC Docket 13-3, at 3-4 (Mar. 7, 2016).

[10] *Id.*

[11] *Id.* at 4.

[12] INDUSTRY ANALYSIS AND TECH. DIV., FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2010, at 7 fig. 5 (Oct. 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-310264A1.pdf.

[13] INDUSTRY ANALYSIS AND TECH. DIV., FCC, VOICE TELEPHONE SERVICES: STATUS AS OF JUNE 30, 2016, at 2 fig. 1 (Apr. 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf.

[14] *Transformation Order* ¶ 748; CTIA, Annual Wireless Industry Survey, https://www.ctia.org/industry-data/ctia-annual-wireless-industry-survey (last updated May 2017).

14. AT&T data for its services track these trends.[15] Between the first quarter of 2011 and the final quarter of 2016, subscriptions for AT&T's VoIP offering, U-verse Voice, increased from 1.9 million[16] to 5.4 million.[17] From the end of 2011 to the end of 2016, AT&T's total mobile subscribers increased from 103.2 million[18] to 134.8 million. In response to this technology evolution, AT&T held trials in 2014-2016 to migrate customers from its Time-Division-Multiplexing ("TDM")-based services to internet protocol ("IP")-based services in two test markets—Carbon Hill, Alabama and West Del Ray Beach, Florida.[19]

15. In today's marketplace, therefore, when someone makes a telephone call there is a very high, and growing, probability that the call will terminate not with an ILEC but with a VoIP provider or a wireless carrier. And when someone calls an AT&T customer, there is a very high, and growing, probability that the call will terminate not with an AT&T Price Cap Carrier, but with an AT&T U-verse or wireless provider.

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[15] *See* AT&T INC., A GLOBAL LEADER IN TELECOMMUNICATIONS, MEDIA, & TECHNOLOGY: 2016 ANNUAL REPORT 22 (2016), https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2016/att-ar2016-completeannualreport.pdf ("AT&T 2016 REPORT").

[16] Fact Sheet, AT&T, U-verse Update: 1Q11, https://www.att.com/Common/merger/files/pdf/1Q11_U-verse_Update_fact_sheet.pdf.

[17] AT&T 2016 REPORT at 16.

[18] AT&T INC., GETTING TO THE FUTURE FIRST: 2011 ANNUAL REPORT 30 (2011), https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2011/ar2011-annual-report.pdf.

[19] *See, e.g.*, Letter from Ola Oyefusi, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, at 1 (July 1, 2016).

B. The Commission ordered a transition to bill-and-keep because the intercarrier compensation system was riddled with inefficiencies and did not reflect current technology.

16. Intercarrier compensation is the system of charges carriers pay to each other to originate, transport, or terminate telephone calls. For decades, the Commission has aimed to reform the ICC regime, which is "governed by a complex system of intercarrier compensation regulations . . . [that] treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services."[20] Since the Communications Act of 1996, a particular policy focus of the Commission has been to remove implicit subsidies from access charges, occurring when calls begin and end in different local calling areas.[21]

17. In 2011, pursuant to its authority under Sections 201, 251(b)(5), 252(d)(2), and 332 of the Act, the Commission ordered a comprehensive overhaul of the intercarrier compensation regime.[22] The Commission found that the longstanding system of carriers charging each other transport and termination fees was "outdated," had "become riddled with inefficiencies and opportunities for wasteful arbitrage," and was "unfair for consumers . . . in the form of hidden,

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[20] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition; Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475 ¶ 178 (2008) ("*ISP-Bound Traffic Order*") (quoting *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 ¶ 5 (2001)).

[21] *See id.* ¶¶ 169-177.

[22] *See Transformation Order* ¶¶ 9, 33-42, 736-1011.

inefficient charges."[23] The Commission also "reject[ed] the notion that only the calling party benefits from a call and therefore should bear the entire cost of originating, transporting, and terminating a call."[24] Instead, "[m]ore recent analyses have recognized that both parties generally benefit from participating in a call, and therefore, that both parties should split the cost of the call. That line of economic research finds that the most efficient termination charge is less than incremental cost, and could be negative."[25] Accordingly, the Commission determined to "abandon the calling-party-network-pays model that dominated ICC regimes of the last century."[26]

18. In place of the outdated ICC regime, the Commission ordered a seven-step transition and end-state policy of "bill-and-keep" for access charges. Under bill-and-keep, carriers no longer charge (and are no longer charged by) competitors for transport and termination. The Commission transitioned to bill-and-keep to: (i) create an incentives-based mechanism that encourages the deployment of more efficient IP systems;[27] (ii) eliminate market-distorting

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[23] *Id.* ¶ 9.

[24] *Id.* ¶ 34.

[25] *Id.* ¶ 744.

[26] *Id.* ¶ 34.

[27] *Id.* ¶ 648 (finding that ICC system "is fundamentally in tension with and a deterrent to deployment of all IP networks"); *see also id.* ¶ 655 (concluding that adoption of bill-and-keep will "promote the nation's transition to IP networks, creating long-term benefits for consumers, businesses, and the nation").

intercarrier arbitrage and level the playing field among technologies;[28] and (iii) benefit consumers by eradicating inefficient charges.[29]

19. The same fundamental changes in traffic patterns and customer demand that drove the Commission's decision to adopt bill-and-keep have eroded the lucrative access revenues of AT&T and other ILECs. As the Commission found, the demand for interstate switched access service "continues to plummet as subscribership to traditional voice phone service reaches new lows."[30] In the face of these market forces, AT&T and other ILECs have sought to delay the implementation of the new bill-and-keep regime and to preserve ICC subsidies whenever and wherever possible. As shown below, AT&T's Step Six tariff revisions reflect this incentive in clear contravention of the Commission's goals.

C. Transformation Step Six requires Price Cap Carriers to transition to bill-and-keep for tandem-switched transport access service where traffic traversing a Price Cap Carrier-owned tandem terminates with an affiliated carrier.

20. "Tandem-switched transport" is defined as "transport of traffic that is switched at a tandem switch - (1) [b]etween the serving wire center and the end office, or (2) [b]etween the telephone company office containing the tandem switching equipment . . . and the end office."[31] It

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[28] Among other things, the ICC "system creates competitive distortions because traditional phone companies receive implicit subsidies from competitors for voice service, while wireless and other companies largely compete without the benefit of such subsidies." *Id.* ¶ 9; *see also id.* ¶ 745 ("a bill-and-keep framework helps reveal the true cost of the network"); *id.* ¶ 752 (bill-and-keep "better reflects the incremental cost of termination, reducing arbitrage incentives").

[29] *Id.* ¶ 756 ("under bill-and-keep, 'success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers'") (quoting *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4787 (2005)).

[30] *Technology Transitions Declaratory Ruling* ¶ 16.

[31] 47 C.F.R. § 69.2(ss).

is a standard access service for which tariff charges must be filed by Price Cap Carriers with the Commission.[32]

21. Step Six of the *Transformation Order*'s transition to bill-and-keep requires AT&T and other Price Cap Carriers to establish tandem-switched transport access service rates no greater than $0.0007 per minute when traffic traverses "a tandem switch that the terminating carrier or its affiliates owns."[33] Price Cap Carriers were to implement conforming rates to take effect on July 1, 2017.[34]

22. On June 7 and June 16, 2017, AT&T Price Cap Carriers filed their annual tariff revisions with the Commission. As explained in its accompanying documents, AT&T applies the $0.0007 rate to traffic traversing an AT&T-owned tandem switch only when the terminating carrier is an AT&T Price Cap Carrier.[35] AT&T does not apply this mandated rate cap to any traffic terminating to other AT&T affiliates, including to AT&T VoIP and wireless providers. Instead,

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[32] *Id.* § 69.4(b)(5).

[33] *Id*. § 51.907(g)(2).

[34] *Id.* § 51.907(g).

[35] Ameritech Operating Companies, Transmittal No. 1859, Description and Justification, 1 (June 7, 2017); BellSouth Telecommunications, Transmittal No. 129, Description and Justification, 1 (June 7, 2017); Nevada Bell Telephone Company, Transmittal No. 300, Description and Justification, 1 (June 7, 2017); Pacific Bell Telephone Company, Transmittal No. 552, Description and Justification, 1 (June 7, 2017); Southwestern Bell Telephone Company, Transmittal No. 3443, Description and Justification, 1 (June 7, 2017); Ameritech Operating Companies, Transmittal No. 1860, Description and Justification, 34 (June 16, 2017); BellSouth Telecommunications, Transmittal No. 130, Description and Justification, 32 (June 16, 2017); Nevada Bell Telephone Company, Transmittal No. 301, Description and Justification, 31 (June 16, 2017); Pacific Bell Telephone Company, Transmittal No. 553, Description and Justification, 31 (June 16, 2017); Southwestern Bell Telephone Company, Transmittal No. 3444, Description and Justification, 32 (June 16, 2017) ("AT&T Description and Justification") (attached as Exhibits 10 and 11).

AT&T charges rates as high as $0.0018 per minute for such calls, over two times the permissible transitional rate.[36]

23. Specifically, in its June 7, 2017 tariff transmittals, AT&T restructured its tandem-switched transport access service rate elements by dividing traffic among three categories:[37]

> Access Tandem Switching provides for the function of switching traffic through the Access Tandem from or to the end office switch(es). The Access Tandem Switching charge is assessed on all originating and terminating minutes of use switched at the Access Tandem. Access Tandem Switching charges are billed as Originating, Terminating to Telephone Company's own end office and Terminating to non-Telephone Company 3rd party locations based on call recordings. Non-Telephone Company 3rd party locations are all offices or other locations not owned by the Telephone Company. Examples of 3rd party locations include terminations to other local exchange and wireless carriers.[38]

24. The Description and Justification narratives accompanying the June transmittals state that AT&T considers "3rd party locations" to "include[] traffic that terminates from a Price Cap ILEC owned tandem to an affiliated CLEC or wireless end office," while "Traffic Terminating from a Price Cap ILEC owned Tandem to its own or any other Price Cap ILEC End Office owned

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[36] Ameritech Operating Companies, Transmittal No. 1860, Tariff F.C.C. No. 2 § 6.9.1(A) (June 16, 2017); BellSouth Telecommunications, Transmittal No. 130, Tariff F.C.C. No. 1 § 6.8.1(C) (June 16, 2017); Nevada Bell Telephone Company, Transmittal No. 301, Tariff F.C.C. No. 1 § 6.8.1(C) (June 16, 2017); Pacific Bell Telephone Company, Transmittal No. 553, Tariff F.C.C. No. 1 § 6.8.2(C) (June 16, 2017); Southwestern Bell Telephone Company, Transmittal No. 3444, Tariff F.C.C. No. 73 § 6.9.2(C) (June 16, 2017) (attached as Exhibit 11).

[37] *See* Ameritech Operating Companies, Transmittal No. 1859, Tariff F.C.C. No. 2 § 6.8.2(D)(4) (June 7, 2017); BellSouth Telecommunications, Transmittal No. 129, Tariff F.C.C. No. 1 § 6.1.3(A)(2)(b)(3) (June 7, 2017); Nevada Bell Telephone Company, Transmittal No. 300, Tariff F.C.C. No. 1 § 6.7.1(D)(3) (June 7, 2017); Pacific Bell Telephone Company, Transmittal No. 552, Tariff F.C.C. No. 1 § 6.7.1(D)(3) (June 7, 2017); Southwestern Bell Telephone Company, Transmittal No. 3443, Tariff F.C.C. No. 73 § 6.8.3(E)(3) (June 7, 2017) (attached as Exhibit 10).

[38] BellSouth Telecommunications, Transmittal No. 129, Tariff F.C.C. No. 1 § 6.1.3(A)(2)(b)(3), (June 7, 2017) (attached as Exhibit 10). The other AT&T June 7 transmittals, *supra* note 37, include substantially similar provisions.

by the same Holding Company, will be considered 'Tandem-to-End Office' that will transition to $0.0007."[39]

II. AT&T'S STEP SIX TARIFF REVISIONS VIOLATE SECTION 51.907(g)(2) AND ARE UNJUST, UNREASONABLE, AND UNREASONABLY DISCRIMINATORY

25. AT&T's charges under its tariff revisions violate Section 51.907(g)(2) and contravene the objectives of the *Transformation Order*.

A. Section 51.907(g)(2) is clear and unambiguous.

26. Section 51.907(g)(2) states: "Each Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute."[40] As explained in the *Transformation Order*, the goal of this provision is to phase out regulated per-minute intercarrier charges and to adopt bill-and-keep as the default methodology for all intercarrier traffic.[41]

27. The terms used in Section 51.907(g)(2) are clear and unambiguous under Commission rules and precedent. The term "Price Cap Carrier" is defined in the regulations governing transitional access service pricing to have the same meaning as the term "Price Cap Local Exchange Carrier."[42] A Price Cap Local Exchange Carrier is "[a] local exchange carrier subject to

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[39] AT&T Description and Justification at 32.

[40] 47 C.F.R. § 51.907(g)(2).

[41] *Transformation Order* ¶ 741.

[42] 47 C.F.R. § 51.903(f) ("Price Cap Carrier has the same meaning as that term is defined in § 61.3(aa) of this chapter"). The reference to Section 61.3(aa) in Section 51.903(f) appears to be a typographical error, since Section 61.3(aa) defines the term "Other participating carrier." The Commission almost certainly meant to refer instead to Section 61.3(bb), which defines the term Price Cap Local Exchange Carrier. *See id.* § 61.3(bb).

regulation pursuant to § 61.41 through 61.49," in other words, a local exchange carrier subject to price cap regulation.[43] Section 51.907(g)(2) thus applies to LECs that file access charge tariffs pursuant to the Commission's price cap rules and requires those entities to set the price for tandem-switched transport access service equal to $0.0007 or less for all calls traversing the tandem switch where the "terminating carrier" or its affiliates owns the tandem.[44]

28. "Terminating carrier" has a well-settled meaning under Commission precedent. It refers to the carrier that "terminates" a call—i.e., the carrier that performs end office switching functions, or their equivalent, and then delivers the call to the called party.[45] This definition encompasses *any* party that performs these functions, no matter what type.[46] The Commission

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[43] *Id.*

[44] In other words, if the charge is being invoiced from an AT&T Price Cap Carrier, pursuant to its tariff, then Section 51.907(g)(2) applies. In other situations, other rules may apply (e.g., if AT&T has a competitive tandem operation serving an area not served by its ILECs, the rule governing tariffing of competitive interstate switched exchange access services (*see id.* § 61.26) would apply).

[45] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 ¶ 510 (2011) ("*CANPRM*") (referring to the "called party's carrier" as the "terminating carrier"); *see also* 47 C.F.R. § 51.701 (similarly defining "termination" in the context of non-access traffic as "the switching of Non-Access Telecommunications Traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises").

[46] *See, e.g.*, *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 230-32 (4th Cir. 2012) (involving an interconnection dispute under Section 251 in which the "terminating carrier" is a CMRS provider); *Sprint Commc'ns Co., L.P. v. Lozier*, 860 F.3d 1052, 1057 n.4 (8th Cir. 2017) (recognizing that Section 251(b)(5) applies to all "traffic exchanged over [public switched telephone network] facilities that originates and/or terminates in IP format") (quoting *Transformation Order* ¶ 940); *CANPRM* ¶ 510 (recognizing that a "terminating carrier" can be a "rate-of-return carrier, price-cap carrier, competitive carrier, or mobile wireless provider").

knows how to clarify a rule when it intends a narrower construction.[47] Nothing in Section 51.907(g)(2) indicates any intent to deviate from the ordinary meaning of "terminating carrier," which serves the Commission's objectives to eliminate ICC inefficiencies and to adopt bill-and-keep.[48]

29. "Affiliate" is likewise a well-established term both in statute and Commission precedent. Under the Communications Act:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[49]

30. The Commission consistently relies on this definition of "affiliate" within the telecommunications context.[50] As with other terms, the Commission knows how to modify this

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[47] *See, e.g.*, *Transformation Order* ¶ 102 n.163 ("For purposes of this order, we define 'community anchor institutions' to mean schools, libraries, medical and healthcare providers, [etc.] . . . . We draw upon the definition used in implementing American Recovery and Reinvestment Act of 2009."); *id.* ¶ 126 n.197 ("Throughout this document, 'Tribal lands' include any federally recognized Indian tribe's reservation, pueblo or colony . . . .").

[48] *See Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260-61 (D.C. Cir. 2005) (declining to interpret a regulation in a way that would undermine its regulatory objective). Furthermore there is no question the Commission intended to include "traffic exchanged over PSTN facilities that originates and/or terminates in IP format" "within the section 251(b)(5) framework" subject to the transitional bill-and-keep framework. *See, e.g.*, *Transformation Order* ¶¶ 33, 940-945.

[49] 47 U.S.C. § 153(2).

[50] *See*, *e.g.*, 47 C.F.R. § 52.12(a)(1)(i) (applying the Communications Act definition of "affiliate" to North American Numbering Plan Administrator neutrality requirements); *id*. § 52.20(d)(1) (applying the Communications Act definition of "affiliate" to Thousands-Block Pooling Administrator neutrality requirements); *id*. § 52.26(a); *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration; Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End the NAPM LLC's Interim Role in Number Portability Administration Contract Management; Telephone Number Portability*, Order, 30 FCC Rcd. 3082 ¶ 160 (2015) (applying the Communications Act definition of "affiliate" to Local Number Portability Administrator neutrality requirements); 47

definition of "affiliate"—and does so expressly—when it determines that circumstances require a different meaning.[51] Indeed, where, as here, a federal agency does not expressly modify the meaning of a statutorily-defined term, such as "affiliate," in a given regulation, the agency may not substitute a different meaning of that term when later interpreting the regulation.[52] To do so would be reversible error.[53]

31. Nothing in the *Transformation Order* suggests, much less states, that the Commission intended to deviate from the statutory definition of "affiliates" in Section 51.907(g)(2).

C.F.R. § 64.613(b)(1) (applying the Communications Act definition of "affiliate" to the TRS Numbering Administrator neutrality requirements); 47 C.F.R. § 1.2112; FCC Form 602, FCC Ownership Disclosure Information for the Wireless Telecommunications Services, at 2 (adopting the Communications Act "affiliate" definition's ten percent direct or indirect ownership or control threshold for competitive bidding disclosures); 47 C.F.R. § 20.22(b); *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6133 ¶ 300 n.803 (2014) (affirming that the "ten percent" equity standard for attribution of mobile spectrum holdings "is consistent with that adopted by Congress in defining ownership interests for purposes of the affiliation definition in the Communications Act, 47 U.S.C. § 153(2)").

[51] *See*, *e.g.*, 47 C.F.R. § 1.2110(c)(5); *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660–4685 MHz*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 374 ¶¶ 26-27 (1997) (establishing a specific definition of "affiliate" for the purposes of determining "designated entity" eligibility); 47 C.F.R. § 76.1300(a) (establishing a specific definition of "affiliated" for purposes of the program carriage rules); 47 C.F.R. § 32.9000 (establishing a specific definition of "affiliated companies" for the purposes of the Uniform System of Accounts for Telecommunications Companies).

[52] *See Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007) ("Although we give 'substantial deference' to [an agency's] interpretation of . . . regulations, we must set it aside if the plain language of the regulation requires another interpretation.").

[53] *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (finding that an agency's interpretation of its own regulations is "plainly erroneous" when contrary to the plain meaning or regulatory purpose at the time of promulgation); *Fabi Constr. Co.*, 508 F.3d at 1079, 1087 (overturning the Secretary of Labor's interpretation because it unreasonably contravened the plain language of the regulation and failed to provide fair notice to regulated entities, among other reasons).

And, in its prior pleadings, AT&T does not seriously question that the Commission intended for this same, statutory definition to apply in Section 51.907(g)(2). Because the sister AT&T entities subject to the regulation have a common 100 percent controlling owner, there is no question that they are "affiliates" within the meaning of the regulation.[54]

B. AT&T's view of Section 51.907(g)(2) ignores its plain meaning and purpose.

32. AT&T's tariff revisions reflect a self-serving and improper attempt to rewrite Section 51.907(g)(2) and evade its requirements. Specifically, AT&T contends that the term "terminating carrier" should apply only when an AT&T Price Cap Carrier terminates a call.[55] Thus, instead of adhering to the rate cap for traffic "traversing a tandem switch that the terminating carrier or its affiliates owns," as Section 51.907(g)(2) clearly states, AT&T contends that the rate cap only applies when the Price Cap Carrier is the "'terminating carrier' and, as such, owns the end office."[56] AT&T further contends "that the term 'affiliate' comes into play only when the '*terminating*' Price Cap Carrier that owns the end office has an affiliate that owns the tandem."[57]

33. By AT&T's own description, its view of Section 51.907(g)(2) is not a question of properly interpreting the actual terms used by the Commission, but rather requires a wholesale *rewriting* of the regulation to fit AT&T's preferred objective of perpetuating ICC subsidies. In

[54] AT&T Inc., Annual Report (Form 10-K), Exhibit 21 (filed Feb. 17, 2017) (attached as Exhibit 12).

[55] AT&T's Opposition to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend and Investigate AT&T Tariff Filings, WC Docket No. 17-65, at 5 (filed June 27, 2017) ("AT&T Opp'n to Level 3 and Sprint") (attached as Exhibit 14).

[56] *Id.* at 5 & n.15 (emphasis added).

[57] *Id.* at 6 (emphasis added).

AT&T's Wonderland, "terminating carrier" means "Price Cap Carrier" and "affiliates" means a "Price Cap Carrier that owns the end office and has an affiliate that owns the tandem."

34. AT&T's attempt to rewrite Section 51.907(g)(2) is improper and has resulted in excessive, unlawful rates for tandem-switched transport access services. As shown above, "Price Cap Carrier" is a defined term in the regulations. The Commission uses this defined term throughout Section 51.907 where it means to do so, and in each of the transition steps to bill-and-keep.[58] Similarly, where the Commission uses a different term, viz., "terminating carrier," it likewise does so purposefully. The two terms are not interchangeable. "Terminating carrier" cannot be properly interpreted to mean the same thing as "Price Cap Carrier." Had the Commission intended to cabin "terminating carrier" in this way, it would have said so in the regulation—as basic administrative law principles require.[59] To be sure, Commission rules and precedent make clear that a "terminating carrier" may at times be a "Price Cap Carrier," but may also be—and increasingly is—a wireless carrier, VoIP provider, or CLEC.

35. Similarly, the statutory definition of "affiliate" centers on ownership or control of, or common ownership or control with, other entities.[60] While AT&T does not dispute the ordinary meaning of this term, it contends that "affiliates" only "comes into play" in the limited instance

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[58] 47 C.F.R. § 51.907.

[59] *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (applying the canon of "specific governs the general" in affirming agency's interpretation of its regulation); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (stating that the Commission cannot import an otherwise absent statutory term where Congress has expressly included the specific term elsewhere in the Act).

[60] 47 U.S.C. § 153(2).

where a Price Cap Carrier is the "terminating" carrier. In that case, and only that case, AT&T posits that the tandem owner must also be an "affiliate" of the terminating Price Cap Carrier for the mandated $0.0007 rate cap to apply.[61] But had the Commission intended to cabin its use of "affiliates" to the limited circumstance that AT&T suggests, the Commission would have made—and, indeed, been required to make—that clear in the regulation. Instead, nothing in the regulation remotely suggests any such limitation of this statutorily-defined term. Under Section 51.907(g)(2)'s plain terms, therefore, "affiliates" comes into play whenever an AT&T Price Cap Carrier owns the tandem and *any* AT&T affiliate is the "terminating carrier."[62]

C. AT&T's interpretation of Section 51.907(g)(2) undermines the Commission's policy objectives.

36. AT&T's failure to comply with Section 51.907(g)(2) also undermines the policy objectives of the regulation and the *Transformation Order*. As shown above, the Commission adopted bill-and-keep to eliminate the market distortions created by intercarrier compensation, to promote market-based pricing and competition, and to incentivize AT&T and other ILECs to migrate away from TDM networks to more efficient all-IP networks.

37. Section 51.907(g)(2) serves each of these objectives by transitioning tandem-switched transport access service to bill-and-keep when a call traverses a tandem owned by the terminating carrier or its affiliates.[63] Application of the plain language and requirements of the

[61] AT&T Opp'n to Level 3 and Sprint at 6.

[62] *See Fabi Constr. Co.*, 508 F.3d at 1087 (holding that plain meaning of one term in a regulation must be given effect in context with other terms in the regulation).

[63] As further discussed *infra* ¶ 54, the regulation does not cover circumstances where calls traverse a third-party-owned tandem, such as one owned by a competitive tandem provider that is neither the terminating carrier nor its affiliate, or where a Price Cap Carrier owns the tandem but the call terminates with an unaffiliated LEC serving a rural area. The Commission sought comment on how to address those situations in the *FNPRM*.

regulation is especially important given the rapidly declining percentage of calls terminated by Price Cap Carriers, and the increasing percentage of calls terminated by VoIP and wireless providers.

38. AT&T's improper rewriting of the regulation, in contrast, undermines the *Transformation Order*'s objectives by perpetuating intercarrier compensation subsidies, impeding market-based competition, and prolonging the use of outdated TDM networks. By improperly shielding the rising tide of VoIP- and CMRS-terminated calls from bill-and-keep, AT&T is artificially inflating tandem-switched access service costs and reducing the resources available to Level 3 and other providers to invest in competitive IP networks. AT&T's tariffs thus *exacerbate* the very problems that Section 51.907(g)(2) intends to correct. Such a result likewise violates hornbook canons of statutory construction.[64]

39. Of course, when it suited its purposes elsewhere, AT&T has *decried* the "arbitrarily asymmetric" imbalance of "some carriers in certain circumstances . . . be[ing] permitted to tariff transport charges indefinitely, whereas others will have already transitioned to bill-and-keep" causing "precisely the type of arbitrary intercarrier compensation system the Commission has been trying to eradicate by its reforms."[65] There is hardly a better example of effectuating an "arbitrarily asymmetric" rate structure than what AT&T has contrived in its Step Six tariff revisions.

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[64] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks and citation omitted); *Twentymile Coal Co.*, 411 F.3d at 260-61 (terms in a regulation should be interpreted consistently with its regulatory objective); *Nat'l Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (finding that the FCC must take into account "the provisions of the whole law, and . . . its object and policy" in interpreting the Cable Communications Policy Act of 1984) (internal quotation marks and citation omitted).

[65] Petition of AT&T Services, Inc. for Forbearance under 47 U.S.C. § 160(c), WC Docket No. 16-363, at 3 (Sept. 30, 2016) ("*AT&T 2016 Forbearance Petition*").

40. In particular, AT&T's tariffs harm competition by impeding Level 3 and other competitors from competing for customers of downstream services. Level 3 and other competitors must continue to purchase tandem-switched transport access services from AT&T when their customers' calls traverse an AT&T-owned tandem that terminates at an end office owned by a non-Price Cap Carrier affiliate of AT&T. As Edwin Stocker, Level 3's Director of Product Management, states, "[s]ince AT&T's legacy tandem-switched transport access service charges are likely well above the incremental costs that AT&T incurs to provide those services, retaining its high legacy charges gives AT&T a competitive advantage over Level 3 and others in providing services for which tandem-switched transport access services are an input."[66]

41. Moreover, the volume of the overcharges is significant. Level 3 pays "**[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** more per month in tandem-switched transport access service charges than it would pay if AT&T applied the Step Six maximum rate of $0.0007 per minute to traffic that terminates with non-Price Cap Carrier AT&T affiliates."[67] AT&T's overcharges will only increase as "the percentage of calls terminated with non-Price Cap Carrier AT&T affiliate end offices increases."[68] Mr. Stocker projects "that the total volume of Level 3-delivered long-distance calls, measured in minutes of use, **[BEGIN CONFIDENTIAL]** [redacted]

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[66] Declaration of Edwin Stocker ("Stocker Decl.") ¶ 13 (attached as Exhibit 9). In addition, because AT&T Price Cap Carriers are no longer subject to the imputation requirement set forth in Section 272(e)(3) of the Communications Act, there is an increased likelihood that this harm would occur. *See* 47 U.S.C. § 272(e)(3) (requiring a BOC to charge a separate affiliate, as set forth in 47 U.S.C. § 272(a), "or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service").

[67] Stocker Decl. ¶ 6.

[68] *Id.*

[redacted] **[END CONFIDENTIAL]** He also projects "that the total volume of long-distance calls, measured in minutes of use, that Level 3 delivers to all VoIP, CMRS, and CLEC end offices combined (via all switches, including tandems and direct connections to end office switches and their equivalents) **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Based on these projections, Level 3's estimated increased costs for tandem-switched transport access services for the next two years are set forth in the table below.[71]

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[69] *Id.* ¶ 7.

[70] *Id*. Mr. Stocker explains that this analysis also indicates that "while the total volume of long-distance voice traffic is declining, (1) the rate at which the volume of long-distance calls delivered to VoIP and CLEC end offices is declining is slower than the rate at which the volume of long-distance calls delivered to Price Cap ILEC end offices is declining, and (2) the volume of long-distance calls delivered to CMRS end offices is increasing." *Id*.

[71] *Id.* ¶ 8. "Level 3 Monthly Minutes of Use" represents Mr. Stocker's estimate "of the volume, in minutes of use, of Level 3 long-distance voice traffic per month for the relevant time periods that [he] project[s] will terminate with non-Price Cap Carrier AT&T affiliate end offices homed exclusively behind AT&T tandems." *Id.* ¶ 9. "Cost Per Minute Difference" figures represent Mr. Stocker's estimates "of the difference between what Level 3 believes is the correct charge per minute for tandem-switched transport access service for calls terminating with AT&T's non-Price Cap Carrier affiliates pursuant to 47 C.F.R. §§ 51.907(g)-(h) ('Correct Cost Per Minute'), and what AT&T will charge per minute for such service under its existing tariffs ('AT&T Cost Per Minute')." *Id.* ¶ 10. "Monthly Cost Difference" figures represent Mr. Stocker's estimates "of the difference between what Level 3 believes is the correct charge per month for tandem-switched transport access service for traffic terminating with non-Price Cap Carrier AT&T affiliates pursuant to 47 C.F.R. §§ 51.907(g)-(h) ('Correct Monthly Charge'), and what AT&T will charge per month for such service ('AT&T Monthly Charge')." *Id.* ¶ 11.

Period	Level 3 Monthly Minutes of Use	AT&T Cost Per Minute	Correct Cost Per Minute	Cost Per Minute Difference	AT&T Monthly Charge	Correct Monthly Charge	Monthly Cost Difference
2017-2018	[BEGIN CONFIDENTIAL] [redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted] [END CONFIDENTIAL]
2018-2019	[BEGIN CONFIDENTIAL] [redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted] [END CONFIDENTIAL]

42. Further, AT&T's tandem-switched transport access services impose additional inefficiencies on Level 3 by requiring that Level 3 exchange traffic in legacy TDM format rather than in more efficient IP format. As Mr. Stocker explains, "in order to take advantage of its high access charges for calls terminated with non-Price Cap Carrier affiliates, AT&T must insist that carriers interconnect in TDM format."[72] The Commission's intercarrier compensation rules apply to voice traffic exchanged in TDM format, but they do not apply to voice traffic exchanged in IP format.[73] By dramatically expanding the scope of access traffic subject to high, legacy tandem-switched transport access charges, the AT&T tariff revisions give AT&T a strong incentive to maintain TDM-based interconnection arrangements rather than transition to more-efficient IP interconnection.

43. Moreover, as Mr. Stocker explains, "AT&T's approach to implementing . . . Step Six . . . will likely create opportunities for carriers to engage in wasteful schemes to maximize the volume of traffic" that is subject to the per-minute rate for traffic terminating with non-Price Cap

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[72] *See id.* ¶ 14.

[73] *See Transformation Order* ¶¶ 40, 940, 969.

Carrier affiliates.[74] These tariff manipulation schemes will "result in costly disputes in which the harmed carrier would be required to incur the time and expense of ensuring that it is charged the correct price for tandem-switched transport access service."[75]

44. Finally, "AT&T's approach to implementing Step Six harms purchasers of downstream services provided by Level 3."[76] That is because "the competitive nature of the long-distance voice market" may well "force retail and wholesale prices to decline if AT&T were to reduce the rates it charges for tandem-switched transport access services associated with traffic terminated by all AT&T-affiliated providers of voice service." However, as Mr. Stocker explains, "if AT&T's tariff revisions are permitted to remain in effect, Level 3's downstream customers will be harmed because they will continue to pay higher prices that must incorporate AT&T's legacy tandem-switched transport access service charges."[77] Level 3 and other competitors are thus at a significant competitive disadvantage because they must continue to purchase these inputs from AT&T when their downstream customers' calls traverse an AT&T-owned tandem and terminate at an end office owned by a non-Price Cap Carrier affiliate of AT&T.

D. AT&T's cost recovery theory contravenes the Commission's policy goals.

45. In a prior attempt to defend its non-compliant tariffs, AT&T argued that restricting Section 51.907(g)(2)'s transitional bill-and-keep rate to the shrinking number of Price Cap Carrier-

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[74] Stocker Decl. ¶ 15.

[75] *Id.*

[76] *Id.* ¶ 16.

[77] *Id.*

terminated calls was necessary because AT&T could only recover its transport and termination costs from its Price Cap Carrier customers.[78] There is no basis in law or policy for this argument.

46. As shown above, Section 51.907(g)(2) applies as a matter of law to *all* "terminating carriers" that are affiliates of a Price Cap Carrier that owns the tandem. Thus, it makes no difference whether an AT&T-affiliated VoIP or wireless provider is the "terminating carrier" as long as the owner of the tandem switch is an AT&T affiliate.

47. AT&T's cost-recovery theory is especially weak given the Commission's finding that termination costs are *de minimis*.[79] The Commission specifically found that "[r]ecord evidence indicates that the incremental cost of termination for circuit-switched networks is . . . extremely small."[80]

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[78] AT&T Opp'n to Level 3 and Sprint at 5-6 n.18; AT&T's Opp'n to CenturyLink at 2-3.

[79] *See, e.g*., *Transformation Order* ¶ 753 ("Our conclusion that the incremental cost of call termination is very nearly zero . . . further supports our adoption of bill-and-keep."); *id.* ¶ 746 n.1309 ("The Commission has cited evidence suggesting that the forward-looking incremental cost of terminating traffic was extremely low, and very near $0 . . . .").

[80] *Id.* ¶ 752. These terminating costs encompass any terminating tandem-switched transport access "functions and services," which likewise will transition to bill-and-keep. To support a finding of negligible costs, the Commission relied upon language and record evidence from the 2008 *ISP-Bound Traffic Order*, in which the Commission looked at average costs for local switching and common transport – the identical functions of terminating tandem switching and transport – to conclude that the incremental costs of terminating calls were *de minimis*. *See, e.g.*, *ISP-Bound Traffic Order* ¶¶ 254-255. Likewise, as AT&T itself recognized, costs for next-generation terminating access services are "comfortably below" the $0.0007 rate. Letter from Henry Hultquist, Vice President – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92; WC Docket Nos. 99-68, 05-337, 07-135, at 4 (filed Oct. 13, 2008); *Transformation Order* ¶ 752. Moreover, ILEC costs for tandem switching and transport are extremely low and have been for at least a dozen years. *See, e.g.*, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, Memorandum Opinion and Order, 20 FCC Rcd. 5279, 5299 (WCB 2005) (listing a $0.00029 per MOU rate for terminating traffic delivered

48. To the extent that its affiliates incur costs when providing tandem-switched transport access services, AT&T would have ample opportunity to recover those costs from its end users. To begin with, since its VoIP, mobile wireless, and CLEC affiliates are wholly owned by AT&T, it can recover the termination costs as an enterprise from any set of AT&T end users. Further, voice service providers that are unaffiliated with ILECs must account for any tandem-switched transport access costs in the same way, usually with no tariffing opportunity to recover even these costs from customers. As the Commission found in the *Transformation Order*, "bill-and-keep is most consistent with the models used for wireless and IP networks, models that have flourished and promoted innovation and investment without any symmetry or balanced traffic requirement."[81] Those providers have been pricing their services at market value, and have been able to absorb AT&T's high tandem-switched transport access service charges. AT&T would have the far less difficult task of recovering its incremental tandem switching and transport *costs*, which are much lower than its legacy tandem-switched transport access *charges*. This is precisely the market-driven outcome the Commission sought when it adopted bill-and-keep as the policy objective for intercarrier compensation.[82]

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at Verizon Virginia's ILEC tandem). It is worth further noting that Verizon Virginia's $0.00029 figure, while already less than half of the $0.0007 rate, is inflated given that it (1) was based on the TELRIC model rather than the Commission's revised incremental cost principle, (2) reflects facilities that have since depreciated, and (3) reflects switching technology that has become even more efficient. *See, e.g.*, *Transformation Order* ¶ 753 n.1332; *ISP-Bound Traffic Order* ¶¶ 262-268 (adopting the "additional cost" methodology to measure incremental costs).

[81] *Transformation Order* ¶ 756.

[82] When it suited its purposes elsewhere, AT&T has railed against such attempts to prop up ICC subsidies, asserting that "charges imposed on long distance carriers for . . . transport rate elements, even though they are mostly capped . . . continue to reflect implicit subsidies and to be priced inefficiently, based on out-of-date rates structures," and that "IXCs are often billed for inefficient and costly tandem and transport services." *AT&T 2016 Forbearance Petition* at 5, 8.

49. But even if AT&T were somehow unable to recover all of the modest costs of providing tandem-switched transport access services for calls terminating with its VoIP, mobile wireless, and CLEC affiliates, that would be no basis for adopting AT&T's proposed interpretation of Section 51.907(g)(2). The Commission expressly rejected the "notion that ICC reform should be revenue neutral."[83] Rather than looking to other carriers to cover costs, the Commission decided to encourage innovation and competition by shifting recovery of such costs to improved products and services. Carriers may also look to the CAF system for subsidies where appropriate.[84] But in all events, Price Cap Carriers and their affiliates must comply with the transition to bill-and-keep under Section 51.907(g)(2).

50. Indeed, the Commission used the broad terms "terminating carrier" (rather than "Price Cap Carrier") and "affiliates" in Section 51.907(g)(2) precisely to ensure that Price Cap Carriers implement bill-and-keep for calls terminating with all of their voice service businesses. Otherwise, AT&T and other Price Cap Carriers could too easily evade the Commission's mandates through corporate gamesmanship.

51. Finally, this is not the first time that an ILEC has attempted to use its affiliates to avoid the application and objectives of the Commission's regulations. The D.C. Circuit has upheld other Commission rules designed to prevent "the systematic abuse of ratepayers" that occurs when ILECs attempt to cross-subsidize their affiliates' costs through inflated tariffs.[85] More generally,

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[83] *Transformation Order* ¶ 38.

[84] *See id.* ¶ 757 ("Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support.") (emphasis in original).

[85] *Sw. Bell Corp. v. FCC*, 896 F.2d 1378, 1379 (D.C. Cir. 1990) (upholding FCC rules governing the transfer of assets between a regulated telephone company and its nonregulated affiliates, finding that the rules were reasonably designed to prevent systematic abuse of ratepayers from cost-shifting); *see also United States v. W. Elec. Co.*, 673 F. Supp. 525, 553-55 (D.D.C. 1987)

the D.C. Circuit has instructed that the Commission may not permit an ILEC to avoid its statutory obligations "by setting up a wholly owned affiliate."[86]

52. AT&T is playing a similar corporate shell game here through its contrived interpretation of Section 51.907(g)(2). Giving proper effect to the ordinary meaning of "terminating carrier" and "affiliates" in the regulation not only serves the policy objectives of the *Transformation Order*,[87] but is also necessary to prevent AT&T from unlawfully evading the Commission's bill-and-keep mandates.

E. AT&T cannot rely on the *FNPRM* to muddle Section 51.907(g)(2)'s plain meaning and purpose.

53. AT&T has previously argued that Level 3's interpretation of Section 51.907(g)(2) "pre-judges" issues on which the Commission separately sought comment in the *FNPRM* that accompanied the *Transformation Order*.[88] In fact, this is an improper attempt by AT&T to rewrite the *FNPRM*.

54. The Commission's request for comments in the *FNPRM* involving tandem-switched transport access services relates to the end state for those tandem switching and transport

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(discussing the Bell Operating Companies' history and incentives for using rate payers to cross-subsidize costs incurred by affiliates), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

[86] *Ass'n of Commc'ns Enters. v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (holding that "the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services").

[87] *Transformation Order* ¶ 752 ("Bill-and-keep will address arbitrage and marketplace distortions arising from the current intercarrier compensation regimes, and therefore will promote competition in the telecommunications marketplace.") (citing ¶¶ 1306-1310 and ¶¶ 1312-1313).

[88] AT&T Opp'n to Level 3 and Sprint at 5-6 & n.18.

charges that are not fully addressed in the *Transformation Order*.[89] These include tandem-switched transport access service charges for calls where a third party owns the tandem.[90] For example, this would be the case where a competitive tandem provider or a Price Cap Carrier provides tandem-switched transport access service but is unaffiliated with the terminating carrier.[91] This scenario raises especially complex and as-yet-unresolved issues where a Price Cap Carrier owns the tandem and the terminating carrier is an unaffiliated LEC serving a rural area. Also not fully addressed in the *Transformation Order* are situations in which the tandem-switched transport access service provider is a Rate-of-Return carrier.[92] These further issues have no bearing here.

55. AT&T has cited language in the *FNPRM* noting "that commenters had 'express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office . . . .'"[93] But this language simply refers to the situations discussed just above, where the tandem owner is not affiliated with the entity subtending that tandem. The very language in the *FNPRM* cited by AT&T itself cites comments by NCTA in which NCTA describes the "pet project" of Bell Companies like AT&T to eliminate regulatory oversight

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[89] *See Transformation Order* ¶ 1306.

[90] *Id.* ¶ 819 ("[T]ransport charges . . . where the terminating carrier does not own the tandem, are not addressed at this time.").

[91] *See id.* ¶¶ 1306-1310. At the time of the *Transformation Order*, competitive tandem providers included, for example, entities such as Inteliquent (formerly known as Neutral Tandem), Peerless Network, and West Telecom Services (formerly known as HyperCube).

[92] The Commission did not establish an end state (e.g., bill-and-keep) for tandem-switched transport access service charges in this scenario, choosing instead to cap rates charged by Rate-of-Return carriers at interstate levels as of the date when the rules took effect. *See id*. ¶ 819 ("[U]nder the transition for rate-of-return carriers . . . interstate and intrastate transport charges will be capped at interstate levels in effect as of the effective date of the rules through the transition.").

[93] AT&T Opp'n to CenturyLink at 3 (citing and quoting *Transformation Order* ¶ 1312).

of the transport and transit services they provide to enable indirect interconnection between non-Bell companies.[94] In these situations, AT&T and other ILECs providing transit may own the tandem, but an unaffiliated service provider would own the end office and would be the "terminating" carrier. The *FNPRM* suggests that the Commission may choose to regulate such traffic under a bill-and-keep regime but has not yet decided the issue.[95] These and other topics in the *FNPRM* have no bearing on the proper interpretation of Section 51.907(g)(2) or the Commission's adoption of bill-and-keep for tandem-switched transport access services encompassed by that rule, which, as the text of that regulation makes plain, includes all traffic where the terminating carrier or its affiliate owns the tandem. Those regulatory questions have been decided.

F. AT&T's reliance on informal, non-binding Commission staff guidance is no excuse for non-compliance with the regulation.

56. AT&T has further claimed that its restrictive view of Rule 51.907(g)(2) "follow[s] the Commission's informal guidance," which, it alleges, represents "the most reasonable interpretation of the rules."[96] These vague assertions are likewise irrelevant.

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[94] Comments of NCTA, WC Docket No. 10-90 *et al.*, at 19-20 (Aug. 24, 2011).

[95] *Transformation Order* ¶ 1313 (the *FNPRM* seeks "comment on the need for regulatory involvement and the appropriate end state for transit service").

[96] AT&T Opp'n to Level 3 and Sprint at 5; AT&T Opp'n to CenturyLink at 2.

57. Informal staff guidance on rules is not binding on the Commission.[97] Nor can staff ignore the plain meaning and purpose of a statute or regulation.[98] As shown above, AT&T's self-serving construction of Section 51.907(g)(2) fails to give proper effect to the plain language and purpose of the regulation. Informal guidance by Commission staff cannot excuse AT&T's unlawful evasion of Section 51.907(g)(2).

<u>COUNT I: Section 201, 47 U.S.C. § 201(b), Unjust and Unreasonable Practice</u>

58. Level 3 repeats and re-alleges each and every allegation contained in paragraphs 1 to 57 of this Complaint as if set forth fully herein.

59. Section 201(b) of the Act provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[99]

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[97] *See, e.g.*, *Transformation Order* App. E ¶ 15 ("[I]nformal staff guidance cannot bind the Commission."); *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Order Denying Stay Petition, 30 FCC Rcd. 12379 ¶ 9 n.24 (WCB 2016) ("It is well-established that informal staff guidance is not binding on the Commission."); *see also Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) (discussing the "well-established view" that an agency is not bound by the informal actions of its staff).

[98] Agencies receive no deference for interpretations of their own rules that are "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Likewise, agencies receive no deference "when there is reason to suspect that the agency's interpretation," such as the informal verbal staff opinion in question here, "does not reflect the agency's fair and considered judgement on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer*, 519 U.S. at 462).

[99] 47 U.S.C. § 201(b).

60. The Commission implements and enforces Section 201(b)'s "just and reasonable" requirement through various rules and regulations.[100] A tariff filer's violation of these rules and regulations is considered an action that is unjust and unreasonable under Section 201(b).[101] A tariff provision is also unjust and unreasonable in violation of Section 201(b) if it violates public policy and harms consumers.[102]

61. AT&T's interpretation of Section 51.907(g)(2), as reflected in the challenged tariffs, is unjust and unreasonable. It ignores the plain terms and purpose of the regulation and forces carriers using AT&T-owned tandem switches to pay excessive rates for services terminated by AT&T-affiliated VoIP providers, wireless carriers, and CLECs, in violation of the rate cap established by the Commission. AT&T's tariffs and practices result in monetary and competitive advantages to AT&T to the detriment of other carriers and consumers.

62. AT&T's interpretation is also contrary to public policy because it impedes and delays the efficient transition to bill-and-keep, which the Commission found promotes competition

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[100] *See Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) ("History [] makes clear that the FCC has long implemented § 201(b) through the issuance of rules and regulations.").

[101] *See id.* at 54 ("Insofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute.") (emphasis in original).

[102] *See, e.g.*, *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 ¶ 96 (2016) (finding all-or-nothing provisions in ILEC pricing plans to be unjust and unreasonable because "they restrict a customer's purchase option without a corresponding reasonable business concern").

in the telecommunications marketplace and incentivizes carriers to serve customers more efficiently.[103]

63. Accordingly, AT&T's tariffs and practices are unjust and unreasonable in violation of Section 201(b) of the Act.

64. As a direct and proximate result of AT&T's violations of the Act, Level 3 has been billed by AT&T and forced to pay tandem-switched transport access service rates that exceed the rate cap mandated in Section 51.907(g)(2). Level 3 has no obligation to pay unjust and unreasonable rates, and is entitled to a full refund of any such amounts paid as will be more fully established during the damages phase of this proceeding.

COUNT II: Section 202, 47 U.S.C. § 202(a), Unjust and Unreasonable Discrimination

65. Level 3 repeats and re-alleges each and every allegation contained in paragraphs 1-64 of this Complaint as if set forth fully herein.

66. Section 202(a) of the Act states, "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[104]

67. In *Competitive Telecommunications Association v. FCC*, the D.C. Circuit, applying the standard the Commission has adopted, instructed that: "An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are

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[103] *Transformation Order* ¶ 741.

[104] 47 U.S.C. § 202(a).

'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable."[105] The Commission applies the same test when evaluating formal complaints filed with the Commission.[106]

68. AT&T's tariffs and practices challenged here are unreasonably discriminatory. The services at issue are "like," involving tandem-switched transport access service.[107] AT&T's unlawful interpretation of Section 51.907(g)(2) results in significantly higher charges for traffic terminating with certain AT&T affiliates than for traffic terminating with an AT&T Price Cap Carrier. The difference between the two charges imposed is unreasonable, forcing Level 3 to pay significantly higher rates for essentially the same service in violation of Section 51.907(g)(2).[108]

69. Accordingly, AT&T's tariffs and practices are unreasonably discriminatory in violation of Section 202(a) of the Act.

70. As a direct and proximate result of AT&T's violations of the Act, Level 3 has been, and is currently being, unjustly and unreasonably billed higher rates for tandem-switched transport access service than permitted under Section 51.907(g)(2). Level 3 has no obligation to pay

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[105] *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *see also Am. Message Ctrs. v. FCC*, 50 F.3d 35, 40 (D.C. Cir. 1995) (applying same three-part test); *C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 742 (D.C. Cir. 1997) (same).

[106] *See, e.g.*, *Nina Shahin v. Verizon Delaware LLC, Verizon Long Distance, and Verizon Online LLC*, Memorandum Opinion and Order, 29 FCC Rcd. 4200 ¶ 9 (2014) ("A complainant alleging discrimination under Section 202(a) of the Act must demonstrate that (1) there are 'like' services at issue; (2) there are differences in the terms and conditions pursuant to which the services are provided; and (3) the differences are not reasonable.").

[107] Stocker Decl. ¶ 3.

[108] Level 3 will provide a detailed accounting of the unreasonable charges incurred during the bifurcated damages phase of this proceeding, but can presently estimate the unreasonable fees to amount to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per month. *Id.* ¶ 6.

discriminatory rates, and is entitled to a full refund for any such amounts paid, as will be more fully established during the damages phase of this proceeding.

PRAYER FOR RELIEF

71. Wherefore, and pursuant to Section 1.721(a)(7) of the Commission's rules, 47 C.F.R. § 1.721(a)(7), Level 3 requests that the Commission:

(a) find that AT&T has violated Section 201(b) of the Act, 47 U.S.C. § 201(b), and engaged in unjust and unreasonable practices by failing to comply with Section 51.907(g)(2);

(b) find that AT&T has violated Section 202(a) of the Act, 47 U.S.C. § 202(a), and engaged in unjust and unreasonable discriminatory practices by charging unreasonably high rates for tandem-switched access service that do not comply with Section 51.907(g)(2);

(c) order AT&T to charge $0.0007 for traffic that traverses an AT&T-owned tandem and is terminated by any AT&T affiliate, including VoIP providers, CMRS carriers, and CLECs; and

(d) order a second phase of the proceeding to determine and award Level 3 its damages.

CERTIFICATION OF SETTLEMENT EFFORTS

Pursuant to 47 C.F.R. § 1.721(a)(8), Level 3 hereby certifies that it has attempted in good faith to discuss the possibility of settlement with AT&T prior to filing this Complaint. By a certified letter dated August 3, 2017, counsel for Level 3 inquired whether AT&T would be willing to revise the tariffs that are the subject of this Complaint or engage in a discussion regarding revising the tariffs and invited AT&T to respond by August 10, 2017.[109] On August 10, 2017, counsel for AT&T informed Level 3 that AT&T would be willing to discuss "issues of mutual concern" but did not indicate that AT&T would be willing to revise its tariffs.[110] On August 14, counsel for Level 3 informed AT&T of Level 3's intention to file a formal complaint under Section 208 of the Communications Act absent contrary clarification that AT&T would be willing to revise its tariffs.[111] Via a certified letter sent August 15, 2017, outside counsel for Level 3 served notice on AT&T, pursuant to 47 C.F.R. § 1.721(a)(8), outlining the allegations that form the basis of this Complaint and requesting a response from AT&T by August 22, 2017 as to AT&T's willingness to discuss a settlement prior to the initiation of the formal complaint process.[112] AT&T did not respond to that letter. On August 17, 2017, representatives of Level 3 and AT&T met with Bureau staff to discuss substantive and procedural issues in anticipation of Level 3's initiation of the formal complaint process. In light of the foregoing, Level 3 does not believe that it would be fruitful to take additional steps to resolve the instant dispute.

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[109] Letter from Joseph C. Cavender, Vice President & Assistant General Counsel, Level 3, to David L. Lawson, Senior Vice President - Assistant General Counsel, AT&T (Aug. 3, 2017) (attached as Exhibit 1).

[110] Letter from Gary L. Phillips, Vice President – Associate General Counsel, AT&T, to Joseph C. Cavender, Vice President & Assistant General Counsel, Level 3 (Aug. 10, 2017) (attached as Exhibit 2).

[111] Letter from Joseph C. Cavender, Vice President & Assistant General Counsel, Level 3, to Gary L. Phillips, Vice President – Associate General Counsel, AT&T, and Thomas Pajda, Assistant Vice President – Senior Legal Counsel, AT&T (Aug. 14, 2017) (attached as Exhibit 3).

[112] Letter from Thomas Jones, Counsel for Level 3, to Gary L. Phillips, Vice President – Associate General Counsel, AT&T, and Thomas Pajda, Assistant Vice President – Senior Legal Counsel, AT&T (Aug. 15, 2017) (attached as Exhibit 4).

Respectfully submitted,

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September 12, 2017

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CERTIFICATE OF FEE PAYMENT

I hereby declare under penalty of perjury that (1) the $230 fee required for each of the ten defendants named in the Formal Complaint is being paid today by Level 3, pursuant to 47 C.F.R. §§ 1.735, 1.1106, via electronic payment submitted contemporaneously with the Formal Complaint by Willkie Farr and Gallagher LLP, and (2) Level 3 Communications, LLC's FRN is 0003723822.

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(202) 303-1000
Counsel for Level 3 Communications, LLC

September 12, 2017

CERTIFICATE OF SERVICE

I, Gorana Neskovic, hereby certify that on September 12, 2017, I caused a true and correct copy of the foregoing Formal Complaint, as well as all accompanying materials, to be served by email to the following:

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Gorana Neskovic

Gorana Neskovic

September 12, 2017

EXHIBIT 6

Great Lakes Commc'ns Corp.'s Objections to Magistrate's Report and Recommendation, *Great Lakes Commc'ns. Corp. v. AT&T Corp.*, 2015 U.S. Dist. LEXIS 181526 (N.D. Iowa June 8, 2015) (No. 13-CV-4117-DEO)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GREAT LA ES COMMUNICATION CORPORATION, Plaintiff/Counterclaim Defendant, vs. AT&T CORP., Defendant/Counterclaimant.	Case No.: 5:13-cv-4117

GREAT LAKES COMMUNICATION CORPORATION'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Great Lakes Communication Corporation ("GLCC"), by counsel and pursuant to 28 U.S.C. 636(b)(1) and Fed. R. Civ. P. 72(b)(2), respectfully objects, in part, to Magistrate Judge Strand's June 24, 2014 Report and Recommendation ("Report") (ECF No. 32).

I. BACKGROUND

For many years GLCC has been completing AT&T's customers' long-distance calls to GLCC's customers, many of which offer free conference calling services to the public. The service GLCC provides AT&T in that connection is called "switched access service." Great Lakes – by virtue of being a CLEC, or competitive local e change carrier – can charge AT&T and other long-distance carriers (also known as "IXCs," or interexchange carriers) for those services via contract or tariff. Until early 2012, AT&T had been paying Great Lakes for those services via contract.

When the Federal Communications Commission ("FCC") revised the tariffing rules for LECs like GLCC that serve conferencing service providers, GLCC filed a revised tariff in accordance with those new rules in January 2012. That new tariff supplanted the parties' previous contract. Even though the FCC established new rules for the tariffed rates that CLECs could charge IXCs for the very services at issue here, AT&T has refused to pay any of Great Lakes' tariffed charges (and also failed to pay its balance under the parties' earlier contract). Therefore, GLCC initiated this suit on December 18, 2013. (Pl.'s Compl., ECF No. 1).

AT&T filed counterclaims against GLCC on January 31, 2014. (Def.'s Answer and Counterclms., ECF No. 11). GLCC moved to dismiss those counterclaims, and for summary judgment, on March 3, 2014. (Pl.'s Mot. Dismiss and Summ. J., ECF No. 17). GLCC argued that AT&T alleged that it had withheld all purportedly improper access charges billed by GLCC, and thus it lacked standing to maintain counterclaims under the Communications Act. GLCC also argued that AT&T's claim in Count I failed because it relied on the legal conclusion that GLCC's end user customers must pay a *tariffed* interstate telecommunications service fee when the FCC has imposed no such requirement. GLCC argued that AT&T's Count II, complaining that GLCC's tariffed rates were unreasonable, and Count II, re uesting a direct connection to Great Lakes' network, were directly contrary to existing FCC policy and the Communications Act and should not be entertained by the Court. Finally, GLCC moved for summary judgment on the grounds that AT&T failed to comply with GLCC's tariffed dispute-resolution provisions.

After the motion was fully briefed, the Court referred the motion to Magistrate Judge Strand to conduct any necessary hearings and prepare a report and recommendation. (Order, May 7, 2014, ECF No. 27). Magistrate Judge Strand conducted a hearing on May 29, 2014. (ECF No. 31) The Magistrate's Report that is the subject of these objections was issued on June 24, 2014. (ECF No. 32) The Report concludes:

- AT&T failed to put forth allegations sufficient to show it has standing to maintain any of its counterclaims, but should be given leave to amend if it can do so in good faith. *Id.* at 13-15.

- With regard to AT&T's claim that GLCC may have improperly billed for access service not terminating to an "end user" who pays a fee for telecommunications service (Count I), the Report and Recommendation concludes that the allegations would be sufficient to maintain this claim (provided AT&T can address its lack of standing). *Id.* at 15-22.

- With regard to AT&T's claim that GLCC's rates are unreasonable (Count II), the Report and Recommendation concludes that AT&T's claim should not be maintained in this Court and should be dismissed without prejudice. *Id.* at 22-28.

- With regard to AT&T's claim that GLCC has acted unreasonably by not allowing AT&T to directly interconnect with its network (Count III), the Report and Recommendation concludes that AT&T's claims should not be maintained in this Court and should be dismissed without prejudice. *Id.* at 28-32.

- With regard to GLCC's claim for summary judgment, the Report and Recommendation concludes that it will not strictly enforce the notice-of-dispute provision against AT&T, and that GLCC's dispute provision re uiring payment for termination services provided in order to preserve a customer's right to dispute is unreasonable and therefore not enforceable. *Id.* at 32-46.

II. STANDARD

Federal Rule of Civil Procedure 72(b)(1) and 28 U.S.C. 636(b)(1) authorize a district court judge to designate a magistrate judge to conduct hearings and provide proposed findings of fact and recommendations for the disposition of dispositive motions. These authorities also provide parties with the right to object to the magistrate judge's recommended decision within 14 days of being served with the recommended decision. *See* 28 U.S.C. 636(b)(1) and Fed. R. Civ. P. 72(b)(2) *see also* N.D. Iowa L.R. 72.1.

The district court reviews the magistrate judge's report and recommendation pursuant to the standards found in 28 U.S.C. 636(b)(1):

> A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. 636(b)(1) *see also* Fed. R. Civ. P. 72(b) (stating identical re uirements) N.D. Iowa L.R. 72(d) (allowing the referral of dispositive matters to a magistrate judge but not articulating any standards to review the magistrate judge s report and recommendation).

The United States Supreme Court has e plained the statutory standard as follows:

> Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not re uire the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the re uest of a party, under a *de novo* or any other standard.

Thomas v. Arn, 474 U.S. 140, 154 (1985). Thus, a district court may review *de novo* any issue in a magistrate judge's report and recommendation at any time. *Id.* If a party files an objection to the magistrate judge's report and recommendation, however, the district court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

De novo review involves no deference to the conclusions reached in the magistrate judge's report and recommendation, but rather requires the Court to make an "independent review" of the law and the facts. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("[w]hen *de novo* review is compelled, no form of appellate deference is acceptable"); *see also Doe v. Chao*, 540 U.S. 614, 620–19 (2004) (*de novo* review is "distinct from any form of deferential review"). The Eighth Circuit has "emphasized the necessity ... of retention by the district court of substantial control over the ultimate disposition of matters referred to a magistrate." *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir.1994). The Eighth Circuit has also repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review when such review is timely re uested. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. 636(b)(1)) *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk*, 15 F.3d at 815) *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995).

III. GLCC OBJECTS TO PORTIONS OF THE REPORT RELATING TO ITS DISPUTE-RESOLUTION PROVISIONS

GLCC challenges two parts of the Report. First, GLCC challenges the conclusion that a genuine issue of material fact e ists regarding whether AT&T is subject to the dispute-resolution provisions in GLCC's tariff. *See* Report, ECF No. 32, at 38-40. Second, GLCC challenges the alternative conclusion that, even if AT&T is subject to the dispute-resolution provisions, the re uirement that an IXC must pay for the access services provided by GLCC in order to maintain a dispute is "unreasonable" based on the FCC's decision in *Sprint Communications L.P. v. Northern Valley Communications, LLC,* 26 FCC Rcd. 10780 ¶ 14 (2011) ("*Sprint v. Northern Valley*"), *aff'd*, 717 F.3d 1017 (D.C. Cir. 2013).[1] *See* Report, ECF No. 32, at 44-45.

IV. DISCUSSION

A. There Is No Material Issue of Fact About Whether GLCC's Dispute-Resolution Provision Applies to AT&T.

GLCC first challenges the Report's conclusion that summary judgment should be denied because GLCC must first prove that AT&T is a "Buyer" as defined by GLCC's tariff in order to establish that AT&T is obligated to pay the disputed charges and file a good faith notice of dispute. This conclusion turns the dispute-resolution provision on its head--it wrongly shifts the burden from AT&T to lodge a good faith dispute if it disagrees with GLCC's invoices for terminating traffic onto GLCC to disprove any allegations made by AT&T in order to receive payment for the terminating services it indisputably provides. The Report's interpretation does

[1] By not challenging the Report's discussion of the written-dispute notice re uirement, ECF No. 32, at 41–43, GLCC does not concede the validity of the conclusion. Rather, GLCC does not seek *de novo* review of that issue now, as it understands the Report to reach no conclusion as a matter of law, but rather to reserve that issue for further consideration by the fact finder should the case proceed to trial.

[2] Indeed, as discussed in the next section, GLCC's tariff is "deemed lawful" pursuant to Section 204(a)(3) of the Act, 47 U.S.C. 204(a)(3). This protection is intended to insulate a carrier from refund liability if the tariffed rates, terms, or conditions are later found to be unreasonable. Of course, if a customer of GLCC's access services can unilaterally engage in

not comport with tariff-interpretation principles in the Eighth Circuit and should not be adopted.

The Eighth Circuit has "held that a tariff is to be construed as any other contract." *Carrier Service, Inc. v. Boise Cascade Corp*., 795 F.2d 640, 642 (8th Cir. 1986) (citing *Penn Cent. Co. v. General Mills, Inc*., 439 F.2d 1338, 1340-41 (8th Cir. 1971)). The Eighth Circuit has also articulated "well-established rules of construction generally adhered to by the courts" in interpreting and enforcing tariffs:

> First, where . . . there is no issue of fact and the words of the tariff are used in their ordinary meaning with no particular connotation in the e pert field . . . , then the interpretation of a tariff ordinarily presents a uestion of law.
>
> Second, a tariff is no different from any contract. And thus, its true application must sometimes be determined by the factual situation upon which it is sought to be impressed.
>
> Third, in interpreting a tariff, its terms must be taken in the sense in which they are generally used and accepted and it must be construed in accordance with the meaning of the words used.
>
> Fourth, the tariff should be construed strictly against the carrier since the carrier drafted the tariff and conse uently, any ambiguity or doubt should be decided in favor of the shipper.
>
> Fifth, such ambiguity or doubt must be a reasonable one and should not be the result of a straining of the language. And, there must be a substantial and not a mere arguable basis in order to justify resolving the doubt against the carrier.
>
> Si th, published rules relating to tariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results.
>
> And finally, a strict construction of a tariff against a carrier is not justified where such a construction ignores a permissible and reasonable construction which conforms to the intentions of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by customer and carriers alike.

Penn Cent., 439 F.2d at 1340-41 (citations omitted). Similarly, the FCC has ruled, "tariffs should be construed to avoid 'unfair, unusual, absurd or improbable results.'" *AT&T Corp. v.*

Alpine Commc'ns, LLC, 27 FCC Rcd. 11511, 11522 (2012) (citing *Penn. Cent.*, 439 F.2d at 1341 *Carrier Serv.*, 795 F.2d at 642). Tariffs should be interpreted to "advance the purpose for which the tariff was imposed." *Id.* (citations omitted).

The Report fails to adhere to these tariff-interpretation principles in numerous respects. Accepting AT&T's argument that the dispute-resolution provision – and its re uirement to pay for the termination services provided – does not apply until GLCC first disproves AT&T's arguments about why it might not be re uired to pay the termination charges contravenes the plain intent of the dispute-resolution provision. It invalidates the very provision that is intended to shield GLCC from having a much larger carrier, like AT&T, engage in self-help withholding based on conclusory and unsupported allegations to starve a terminating LEC into accepting an unfavorable settlement. In other words, the Report credits AT&T's argument even though the argument is "the result of a straining of the language" in the dispute-resolution provision. *Penn Cent.*, 439 F.2d at 1341 *see also Nat'l Van Lines v. United States*, 355 F.2d 326, 332 ("If a tariff is subject to different constructions, an interpretation which is reasonable and consistent with the purposes of the tariff should be preferred to a construction which is impractical or which leads to absurd conse uences.").

Even if it could be argued that GLCC's tariff "language is not perfect," the Court should "read [it] in its entirety" to determine "the proper interpretation." *Penn Cent.*, 439 F.2d at 1342. Here, AT&T's argument, and the Report, ignores key parts of the Tariff in concluding that GLCC must disprove AT&T's allegations before it can enforce the dispute-resolution provision (at which point it is academic anyway). For e ample, there is no discussion of the language in GLCC's tariff providing that "[a]ll bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company," and provision

4.1 of the Tariff, which relates to Constructive Ordering of GLCC's access services. *See* Tariff No. 2, 3.1.7.1 (GLCC-41) *id.* 4.1 (GLCC-46). Under the Constructive Ordering provision, AT&T is presumed to have ordered tariffed e change access services by virtue of sending the traffic to GLCC's network. *Id.* 4.1 (GLCC-46).

In other words, AT&T has seized upon a single word, and attempts to create ambiguity in the tariff, in order to avoid the plain intent of the provision. The Report, if adopted, would allow AT&T to avoid the dispute-resolution provision altogether, an "unfair, unusual, absurd or improbable result[ ]." *Penn Cent.*, 439 F.2d at 1341. It is fundamentally unfair for one of the nations' largest telecommunications carriers which is, without dispute, sending millions of minutes of traffic on behalf of its paying customers to GLCC's network to avoid the dispute provision merely by raising a uestion about whether it will ultimately – after months of discovery and a hearing – be held liable for the tariffed access charges. Such a conclusion is absurd because it allows AT&T and every other carrier to drag GLCC into court based on any argument, and re uire GLCC to forgo payment for the work. Only then, after significant litigation and a final decision, would AT&T be re uired to comply with the provision that was intended to be a prere uisite for lodging a good faith dispute. This flawed interpretation renders the dispute-resolution provision meaningless.[2]

The interpretation in the Report also does not "conform[ ] to the intentions of the framers of the tariff" and fails to "accord[ ] with the practical application given by customer and carriers alike." *Penn Cent.*, 439 F.2d at 1341. GLCC's tariff language is consistent with a

[2] Indeed, as discussed in the next section, GLCC's tariff is "deemed lawful" pursuant to Section 204(a)(3) of the Act, 47 U.S.C. 204(a)(3). This protection is intended to insulate a carrier from refund liability if the tariffed rates, terms, or conditions are later found to be unreasonable. Of course, if a customer of GLCC's access services can unilaterally engage in self-help and refuse to pay its bills, § 204(a)(3)'s protection against refund liability is entirely illusory. An interpretation that is so directly contrary to Congress's intent should be avoided.

decade-old policy that IXCs must pay, rather than unilaterally withhold, disputed access charges. *See, e.g., CLEC Access Charge Order*, 16 FCC Rcd. 9923 23 (2001) (e pressing concerns about IXCs' decision to engage in unilateral withholding, including the fact that "AT&T . . . has fre uently declined altogether to pay CLEC access invoices that it views as unreasonable."); *id.* 42 (adopting a tariff system because "the attraction of a tariffed regime [is that] it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that receives access service is bound to pay the tariffed rates."); *In re. Bus. WATS, Inc. v. AT&T Co.*, 7 FCC Rcd. 7942 ¶ 2 (1992) ("The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed . . . .") (*citing In re MCI Telecomms. Corps.*, 62 F.C.C.2d 703, 705-06 (1976)) *In re Tel-Central of Jefferson City, Mo., Inc. v. United Tel. of Mo., Inc.*, 4 FCC Rcd. 8338, 8339 ¶ 9 (1989) ("[T]he law is clear on the right of a carrier to collect the tariffed charges, even when those charges may be in dispute between the parties.") . GLCC implemented this FCC policy in its tariff. The Report, if accepted, would strip GLCC of its ability to enforce its dispute-resolution provision.

The practical application given to the provision by AT&T and other carriers also demonstrates that the Report's interpretation of the provision should not be adopted. AT&T tendered a notice of dispute pursuant to the very same provision that it now contends not to be bound by. *See* Report,_ECF NO. 32, 42-43 (crediting AT&T's argument that an email notice of dispute was sufficient to deny summary judgment on that particular basis). AT&T stated that it "intended to formally notify" GLCC of its intent to dispute the access charges, but AT&T never asserted that it was not required to file the dispute notice or that it was not a "Buyer" as defined by GLCC's newly-effective tariff. *See* Pl.'s Mot. Dismiss App., ECF No. 17-3 (GLCC-63).

Other carriers have also clearly understood the import of the dispute-resolution provision. In opposing the identical tariff provision filed by another CLEC (Northern Valley Communications, LLC), Sprint asserted that it would be re uired to pay the invoiced charges, even if there was doubt about whether Northern Valley provided the services "pursuant to the tariff." *See* Declaration of G. David Carter (Carter Decl.), 14 & E . I, at 3-4 ("Stated differently, payment will continue to be re uired to dispute a bill or any portion of the bill. And, to make matters worse, the bill need not be for any services that Northern Valley provides – let alone any services provided pursuant to tariff."). Qwest Communications (now CenturyLink), put it this way:

> . . . a "Buyer is responsible for the payment of charges for any service it takes from [Northern Valley].' Thus, any entity receiving a bill from Northern Valley inevitably will be an IXC, such as west, sending interstate intere change traffic to Northern Valley . Accordingly, '*everyone* to whom [Northern Valley] sends an access bill' also falls within the supposedly limited category of 'Buyer' that 'transmitted an interstate telecommunications to [the CLEC's] network.' Thus, the revised version of Section 3.1.7.1(b) still 'requires everyone to whom Northern Valley sends an access bill to pay that bill . . . in order to dispute a charge.

See Carter Decl., 13 & E . , at 4-5 (alteration in original). These arguments, about the identical tariff provision (which, as discussed more fully below, were filed specifically to address the FCC's concerns articulated in *Sprint v. Northern Valley*), clearly show that the industry's understanding that an IXC transmitting interstate intere change traffic must pay for the traffic it sends if it intends to preserve the right to dispute the charge. Thus, the Report's interpretation is flawed because it adopts an argument that is inconsistent with the interpretation placed on the provision by GLCC, AT&T, west, and Sprint.

Finally, the Report suggests that the denial of GLCC's Motion for Summary Judgment is compelled by the FCC's decision in *AT&T Corp. v. YMax Communications*, 26 FCC Rcd. 5742

(2011). *See* Report, ECF No. 32, 45. The Report mistakenly relies on *Ymax* for the proposition that pay-and-dispute provisions like GLCC's are not enforceable, and erroneously draws the conclusion that a CLEC always bears the burden of proof in disputes about the application of its tariff. But *YMax* never reached that conclusion. Indeed, the FCC had no occasion to consider whether AT&T's withholding would have been proper if YMax had a tariff provision that clearly mandated payment in order to preserve disputes, as GLCC's does. Rather, the FCC concluded that "AT&T [ ] adequately dispute[d] the charges at issue" (presumably in accordance with whatever dispute resolution provision was included in YMax's tariff). 26 FCC Rcd. 5742 ¶ 50.[3]

Thus, in *YMax*, the FCC never had to decide whether AT&T's withholding would have been proper if Ma had a deemed lawful tariff that included a pay-and-dispute provision. For these reasons, *YMax* is inapposite and does not justify the refusal to enforce GLCC's tariff.

In sum, the Report adopts a construction of GLCC's dispute-resolution provision that is inconsistent with the plain intent of the provision and that hinders, rather than enforces, the purpose for which the tariff was filed. In these circumstances, the conclusions reached in the Report should not be adopted. Rather, the Court should conclude that AT&T was re uired to pay GLCC the tariffed rate when it indisputably sent its interstate intere change traffic to GLCC's network if it wanted to preserve its dispute.

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[3] Moreover, as the FCC observed in *YMax*, the "fundamental problem appears to be that Ma chose to model its Tariff on common language in LEC access tariffs, even though the function Ma performs are very different from the access services typically provided by LECs." 26 FCC Rcd. 5742 ¶ 14. GLCC, on the other hand, did not copy a standard tariff, but rather crafted a custom tariff that appropriately reflects the services it provides. GLCC's tariff ensures that IXCs know that it serves high volume conference calling customers (in accordance with the FCC's "access stimulation" rules) and that if an IXC sends interstate interexchange traffic to these customers they have an obligation to pay for the traffic in order to preserve any disputes they may wish to lodge. And, as discussed more fully below, GLCC filed its tariff on 15 days' notice and received deemed lawful protection as provided by 47 U.S.C. § 204(a)(3). Ymax, on the other hand, filed its tariff on 1 day's notice. 26 FCC Rcd. 5742, n.4.

B. The Court is Not Empowered to Declare a "Deemed Lawful" Tariff Provision Unreasonable.

The Report also errs in concluding that the dispute-resolution provision is "unreasonable." ECF No. 32, 44-46. That conclusion, applied retroactively, is precluded by 47 U.S.C. 204(a)(3). A finding that a deemed-lawful tariff provision is unreasonable may only be made *by the FCC* on a *prospective basis.* Thus, the Report's conclusion should not be adopted by the Court on its *de novo* review.

Section 204(a)(3) provides that "a new or revised charge, classification, regulation, or practice" filed on a "streamlined basis," which is defined as either 15 days' notice for rate increases or 7 days' notice for rate decreases, shall be "deemed lawful." 47 U.S.C. § 204(a)(3). It is undisputed that GLCC's tariff, including its dispute-resolution provision, was filed on 15 days' notice and therefore was entitled to the "deemed lawful" protection afforded by the Act. *Id*. As the FCC has held, "because section 204(a)(3) uses the phrase 'deemed lawful," it must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is ***conclusively presumed to be reasonable*** and, thus, a lawful tariff filing during the period that the tariff remains in effect." *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. 2170 19 (1997) (emphasis added).

The FCC has also made clear that, while it retains the authority to re uire modifications of deemed-lawful tariffs, those changes apply only on a prospective basis. *Id.* ¶ 20 ("tariff filings that take effect, without suspension, under section 204(a)(3) that are subse uently determined to be unlawful . . . would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness."). Moreover, as AT&T's opposition itself acknowledged, "tariff provisions that are deemed lawful when they take effect may be found unlawful subsequently [only] in Section 205 or 208 proceedings." Def.'s Opp'n Mot. Dismiss and Summm. J., ECF No. 20, at 12, n.19 (uoting *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. 2170   21 (1997)). Both Section 205 and 208 of the Act allow the FCC, ***but not a federal court***, to investigate claims regarding tariffed rates and terms. *See* 47 U.S.C. § 205 ("***the Commission*** is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the ma imum or minimum, or ma imum and minimum, charge or charges to be thereafter observed . . . .") (emphasis added); 47 U.S.C. § 208 ("Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, ***may apply to said Commission*** by petition . . . ") (emphasis added). The Commission's order implementing the "deemed lawful" protections established by the Telecommunications Act of 1996 make no reference to any provision that would enable a federal court to invalidate or declare a deemed-lawful tariff provision unreasonable. *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. 2170   7 – 24.

The conclusion that a "deemed lawful" tariff provision cannot be retroactively invalidated, but rather must be enforced until declared unreasonable by the FCC on a prospective basis, reflects the choice that Congress made in adopting 204(a)(3) when deregulating the telecommunications industry in 1996. As the FCC has observed, Congress made a policy choice, and "this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful." *Id.*   20. Or, as the D.C. Circuit put it, when a tariff is filed pursuant to the streamlined tariff provisions contained in Section 204(a)(3) (which GLCC's tariff was), "no proxy for (un)reasonableness is needed. Since § 204(a)(3) deems the tariff] to be lawful, the inquiry ends." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) (evaluating the reasonableness of tariffed rates, but also acknowledging that Section

204(a)(3) e tends to tariff regulations and practices as well, *see id.*, 413).

Thus, the Report reaches the wrong conclusion as a matter of law. A federal district court is not at liberty to judge whether a "deemed lawful" tariff appears to resemble a provision previously found problematic by the FCC in another case, as the Report purports to do. *See* ECF No. 32, at 45. Rather, when the tariff provision, like GLCC's here, is different than the one considered by the FCC, the Court must enforce the tariff provision when it is deemed lawful, and the prerogative to re uire a tariff provision to be changed prospectively lies e clusively with the FCC. The Court can only enforce this provision as written. For these reasons, the Court should reject the Report's conclusion that GLCC's tariff provision is unreasonable.

C. Here, the FCC Already Considered and Rejected the Very Same Arguments Made by AT&T and Accepted in the Report.

While GLCC respectfully submits that it would be wrong to accept the Report's conclusion that the dispute-resolution provision is unreasonable, GLCC can also show that the FCC itself has already considered the very provision at issue and found it to be acceptable. Indeed, because GLCC and Northern Valley share the same counsel, it is able to submit the accompanying materials showing that the provision was reviewed by FCC staff, considered appropriate when it was filed by Northern Valley Communications in response to the FCC's decision in *Sprint v. Northern Valley*, and then utilized by GLCC when it updated its tariff at issue here. [4] As the evidence demonstrates, the very arguments made by AT&T in this case, and accepted by the Report, were already considered – and rejected – by the FCC.

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4 The Court is entitled to consider additional evidence when reviewing objections to a Magistrate's Report. Fed. R. Civ. P. 72(c) (in resolving objections, the "district judge may . . . receive further evidence . . . ."). This evidence was not originally presented in conjunction with GLCC's motion in light of Section 204(a)(3)'s deemed lawful protections, which are intended to insulate a carrier from retroactive determinations like that proposed in the Report. owever, since the Report nevertheless proposes that the Court conclude that the provision is unreasonable, GLCC is compelled to establish these additional details surrounding the adoption of its dispute-resolution provision.

On July 18, 2011, the FCC released its decision in *Sprint v. Northern Valley*, concluding that the dispute resolution provision filed by Northern Valley, a South Dakota CLEC, was unreasonable. The opinion states in pertinent part:

> . . . Northern Valley's "Billing Disputes" provision requiring carriers to dispute bills within 90 days or waive "any and all rights and claims with respect to the bill and the underlying dispute" is unreasonable. This provision contravenes the two-year statute of limitations in the Communications Act, and, by its terms, purports unilaterally to bar a customer from e ercising its statutory right to file a complaint within that limitations period. Similarly, the Tariff provision that re uires all disputed charges to be paid "in full prior to or at the time of submitting a good faith dispute" is unreasonable. As written, this provision re uires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for e ample, if no services were provided at all), in order to dispute a charge. Further, the Billing Disputes provision states that Northern Valley is "the *sole judge* of whether any bill dispute has merit." This provision is unreasonable, because it conflicts with sections 206 to 208 of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier s alleged violation of the Act.

Id. 14 (emphasis in original). The Commission directed Northern Valley to file tariff revisions "consistent with" its decision within ten days. *Id.* 24.

Northern Valley's counsel (also GLCC's counsel) drafted proposed modifications to the dispute-resolution provisions in response to the *Sprint v. Northern Valley* decision. *See* Carter Decl., ¶ 3. After drafting proposed revisions, Northern Valley's counsel shared those proposed revisions with two members of the FCC's Wireline Competition Bureau, Pricing Policy Division, which has regulatory authority over CLEC access service tariffs. *Id.* 4 – 6 E s. A – B. Those individuals re uested minor modifications to portions of the tariff, but did not re uest any modifications to the revised dispute-resolution provisions. *Id.* 7 – 9 E s. C – E. Ultimately, all of the proposed revisions were reviewed by the Chief of the Pricing Policy Division, who concluded that the revised provisions were suitable for filing. *Id.* 10.

Northern Valley filed its tariff revisions on July 26, 2011. *Id.* 11. Those revisions included the following dispute resolution language:

> 3.1.7 Billing Disputes
> 3.1.7.1 General
> (a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, "notice of a good faith dispute" is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.
>
> (b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network.

Id.; Ex. G. Northern Valley's tariff changes were filed on 15 days' notice in order to receive the "deemed lawful" protections afforded by 47 U.S.C. § 204(a)(3). *Id.*

On August 2, 2011, two IXCs, Qwest Communications Company, LLC ("Qwest") and Sprint Communications Company, L.P. ("Sprint"), filed petitions asking the FCC to reject or suspend Northern Valley's tariff revisions so that the revisions would not receive deemed-lawful protection. *Id.* 12. Both argued that the revised dispute-resolution provisions had not been changed enough to be reasonable and that, as a result, they remained unlawful and should not be allowed to become effective. *Id.* 13 – 14 E s. – I.

Northern Valley opposed the re uests to suspend or reject the tariff, e plaining that it had made several materials changes to the dispute resolution provision. Specifically, Northern Valley noted that:

> . . . Transmittal No. 8 modifies the re uirement for customers to pay charges in all circumstances in order to initiate a good faith dispute. The revised language now provides that 'Buyer shall tender payment for any disputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to

> the Company's network.' Transmittal No. 8 at § 3.1.7.1(b). The provision complies not only with the *Sprint v. Northern Valley Order*, but also the long line of Commission precedent and case law establishing that a LEC is entitled to demand payment for providing services, even if there is a billing dispute. *In re Tel-Central of Jefferson City, Mo., Inc. v. United Tel. of Mo., Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1992) ("[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."); *In re Bus. WATS, Inc. v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) ("The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed….") (citing *In re MCI Telecomms. Corp., Am. Tel. and Tel. Co. & the Pac. Tel. & Tel. Co.*, 62 FCC.2d 703, 6 (1976)). ere, Northern Valley's tariff has been clearly modified to exclude situations when there is a dispute about whether Northern Valley is, in fact, having interstate intere change traffic transmitted across its network. This modification prevents Northern Valley from using the payment re uirement in an unreasonable manner to demand payment when it is not, in fact, providing service, without erroneously interfering with its right – as provided by Commission precedent – to receive payment in the face of a dispute.

Id. 15 E . J, at 8-9. Northern Valley further pointed out that it had modified the re uirement to file disputes within 90 days and also removed the language providing that it was "the sole judge of the validity of disputes." *Id.* Northern Valley explained that Qwest's and Sprint's arguments misconstrued *Sprint v. Northern Valley* to "preclude[] Northern Valley from ever demanding payment when an IXC disputes a bill," and that it would not be "reasonable to allow IXCs to avoid their payment obligations by proffering any dispute, however pretextual." *Id.* 16. Northern Valley asserted that "the revised dispute provisions strike the appropriate balance of allowing an IXC a full and fair opportunity to dispute a bill, while ensuring that it does so in good faith and without using its non-payment activities as an unfair bargaining tool." *Id.*

Despite the IXCs' challenges, the FCC declined to suspend or reject Northern Valley's tariff revisions, allowing those revisions to become effective and receive Section 204(a)(3)'s deemed-lawful protections on August 10, 2011. *Id.* 17. The Pricing Policy Division of the Wireline Competition Bureau subse uently released a public notice expressly rejecting Qwest's and Sprint's arguments, concluding that they did "not present[ ] compelling arguments that these transmittals are so patently unlawful as to require rejection" and that they did not "raise significant uestions of lawfulness . . . ." *Id.*

When GLCC revised its tariff in January 2012, well aware of the effort undertaken by Northern Valley to craft revised dispute-resolution provisions that responded to *Sprint v. Northern Valley*, but also intending to enforce the Commission's long-standing rule that IXCs must *pay and dispute*, GLCC adopted the same dispute-resolution provisions that the FCC had found acceptable for Northern Valley. *Id.* 18 – 19. No carrier opposed GLCC's new tariff and it gained deemed-lawful status. Thus, GLCC does not just "claim[ ] that it drafted the Tariff's billing dispute provisions to comply with [*Sprint v. Northern Valley*]," Report, ECF No. 32, at 45, the evidence clearly establishes that it did e actly that. Accordingly, there is no basis for the Court to conclude that, after diligently responding to the *Sprint v. Northern Valley* decision, GLCC's dispute-resolution provisions are nonetheless rendered unreasonable by that very decision.

Indeed, it is striking that in seeking suspension or rejection of Northern Valley's revised dispute-resolution provision, west argued that the changes made by Northern Valley were not sufficient enough to make the new provisions lawful. Specifically, west argued that the dispute-resolution provision's lawfulness,

> is not affected by the parenthetical phrase in *Sprint v. Northern Valley* that a disputed access bill would have to be paid, "no matter what the circumstances (including, for e ample, if no service were provided at all), in order to dispute a charge." That phrase cannot be read to suggest that a situation in which "no services were provided" is the *only* circumstance in which a payment re uirement would be held an unreasonable condition for disputing a charge . . . .

See Carter Decl., 13 E . , at 2-3 (uoting west Pet. to Suspend Pet. to Reject, or in the Alternative, to Suspend and Investigate Northern Valley's Transmittal No. 8) (quoting, in turn, *Sprint v. Northern* Valley, 26 FCC Rcd. 10780 14).

Qwest's argument -- considered and rejected by the FCC's Pricing Policy Division -- is identical to the reasoning in the Report, which states:

> GLCC argues that the FCC's disapproval of the advance payment requirement applies only when 'no services were provided at all.' In making that argument, however, GLCC selectively uotes from an example provided by the FCC. The entire sentence is as follows: "As written, this provision re uires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for e ample, if no services were provided at all), in order to dispute a charge." The FCC did not state that an advancement payment requirement is unreasonable *only* when no services were provided in connection with the dispute invoice.

ECF No. 32, at 45 (emphasis in original) (citations omitted). Because the conclusion that GLCC's dispute-resolution provision is "unreasonable" rests on the very same arguments that the FCC's Pricing Policy Division considered and rejected, the Report errs as a matter of law in declining to enforce GLCC's dispute-resolution provision as tariffed.

In sum, the Court, in undertaking its *de novo* review, should decline to find the dispute-resolution provision unenforceable. Rather, based on the undisputed evidence establishing that AT&T transmitted interstate intere change traffic to GLCC and failed to tender a good faith dispute (by engaging in its self-help withholding of all disputed charges), the Court should grant GLCC's Motion for Summary Judgment.

CONCLUSION

The Report's discussion regarding GLCC's dispute-resolution provision is flawed on two separate grounds. First, it credits an interpretation of the provision that is entirely inconsistent with, and vitiates, the plain meaning and intent of the dispute-resolution provision. It is fundamentally unfair to interpret the provision to enable AT&T to send millions of minutes of its customers' interstate long-distance traffic to GLCC without paying anything for that traffic until GLCC disproves AT&T's baseless accusations. In light of decades of FCC precedent supporting a pay-and-dispute re uirement for large incumbent carriers like AT&T, the Report reaches an unnatural interpretation of the clause and an unreasonable outcome.

Even more critically, the Court should decline to adopt the Report's conclusion that GLCC's dispute-resolution provision is unenforceable because it is "unreasonable." Only the FCC, acting on a prospective basis, has the ability to disturb a tariff provision that was filed in accordance with the streamlined tariffing rules and deemed lawful by operation of 47 U.S.C. 204(a)(3). And, here, the FCC has already considered arguments about this identical dispute provision and concluded that they do not raise significant uestions of lawfulness. Thus, even if it might be appropriate for a court to question the reasonable of a LEC's deemed-lawful tariff in some circumstances, it certainly would not be appropriate to do so here.

In short, because it is: (1) undisputed that AT&T has sent millions of minutes of interstate interexchange traffic to GLCC's network, and (2) clear that GLCC's tariff required AT&T to pay the tariffed charges for this traffic if it sought to preserve its ability to dispute those charges, summary judgment against AT&T is appropriate. GLCC should not be deprived of the financial resources it is due, and be re uired to pay for a costly discovery and trial, in order to enforce the very provisions of its tariff that are supposed to protect it from AT&T's abusive self-help.

Dated: July 8, 2014

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GREAT LA ES COMMUNICATION CORPORATION, Plaintiff/Counterclaim Defendant, vs. AT&T CORP., Defendant/Counterclaimant.	Case No.: 5:13-cv-4117

DECLARATION OF G. DAVID CARTER

I, G. David Carter, do depose under oath and state as follows:

1. I am an attorney at Arent Fo LLP and serve as counsel to Great Lakes Communication Corporation (GLCC), the plaintiff in this matter. The matters sworn herein are made from my personal knowledge, and I am competent to testify thereto.

2. On July 18, 2011, the Federal Communications Commission released its decision in *Sprint Commc'ns L.P. v. Northern Valley Commc'ns, LLC,* 26 FCC Rcd. 10780 (2011), *aff'd*, 717 F.3d 1017 (D.C. Cir. 2013) (*Sprint v. Northern Valley)*. In *Sprint v. Northern Valley* the FCC concluded that Northern Valley's dispute resolution provision was unreasonable. The opinion states:

> In addition, Northern Valley's "Billing Disputes" provision requiring carriers to dispute bills within 90 days or waive "any and all rights and claims with respect to the bill and the underlying dispute" is unreasonable. This provision contravenes the two-year statute of limitations in the Communications Act, and, by its terms, purports unilaterally to bar a customer from e ercising its statutory right to file a complaint within that limitations period. Similarly, the Tariff provision that requires all disputed charges to be paid "in full prior to or at the time of submitting a good faith dispute" is unreasonable. As written, this provision re uires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for e ample, if no services were provided at all), in order to dispute a charge. Further, the Billing Disputes provision states that Northern Valley is "the *sole judge* of whether any bill dispute

> has merit." This provision is unreasonable, because it conflicts with sections 206 to 208 of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier s alleged violation of the Act.

Id. 14.

3. In *Sprint v. Northern Valley*, the Commission directed Northern Valley to file tariff revisions "consistent with" its decision within ten days. *Id.* 24. I served as counsel to Northern Valley in responding to and addressing the FCC's *Sprint v. Northern Valley* decision, including its conclusion that Northern Valley's dispute resolution provision was unreasonable.

4. On or about July 20, 2014, I initiated contact with Pamela Arluk, who at that time held the title Assistant Division Chief, Pricing and Policy Division, within the Wireline Competition Bureau at the FCC to determine whether FCC staff would review proposed modifications to Northern Valley's tariff, including the dispute resolution provision, to provide feedback about whether the modifications proposed by Northern Valley were sufficient to address the concerns identified in *Sprint v. Northern Valley*.

5. On July 20, 2011, I transmitted via email a draft of Northern Valley's Tariff Transmittal No. 8, "which would effectuate the changes directed by the Sprint v. Northern Valley order," to Ms. Arluk and her colleague Vienna Jordan. *See* Email from D. Carter to P. Arluk and V. Jordan (July 20, 2011), a true and correct copy of which is attached hereto as E hibit A. The attached draft transmittal included a proposed modification to the Billing Disputes provision as follows:

> 3.1.7 Billing Disputes
> 3.1.7.1 General
> (a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, "notice of a good faith dispute" is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number

under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.

(b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network.

See NVC Transmittal No. 8 – 7.19.11 Draft (attached to E hibit A), First Revised Page No. 32.

6. Ms. Arluk responded to my email later that day. *See* Email from P. Arluk to D. Carter (July 20, 2011), a true and correct copy of which is attached hereto as E hibit B. Ms. Arluk in uired about the deadline for filing the revisions and suggested that Northern Valley wait, if it could, to file because "Al is out of the office through Monday and I think it would be good to get his sign off before you file." *Id.* I understood Ms. Arluk's reference to "Al" to be referring to Al Lewis, who at that time served as Chief of the Pricing Policy Division in the FCC's Wireline Competition Bureau.

7. On July 25, 2014, Ms. Arluk's colleague, Vienna Jordan, emailed me to provide comments regarding the draft NVC Transmittal No. 8. *See* Email from V. Jordan to D. Carter (July 25, 2011), a true and correct copy of which is attached hereto as E hibit C. Ms. Jordan did not e press any concerns about the proposed revisions to the billing dispute provisions.

8. Later that day, I responded to Ms. Jordan to provided her with a revised draft. *See* Email from D. Carter to V. Jordan (July 25, 2011), a true and correct copy of which is attached hereto as E hibit D. I also in uired whether her comments reflected feedback from Pam Arluk and Al Lewis or whether we should await further feedback from them. *Id.* The revised draft included with the email to Ms. Jordan continued to include the same dispute resolution provision as the first draft. *See* NVC Transmittal No. 8 – 7.25.11 Draft (attached to E hibit D), First Revised Page No. 32.

9. Ms. Jordan responded to indicate that her changes did not reflect comments from Al Lewis, but that "Pam [Arluk] is ok with what we've done." *See* Email from V. Jordan to D. Carter (July 25, 2011), a true and correct copy of which is attached hereto as E hibit E.

10. The ne t day, Ms. Jordan wrote again. *See* Email from V. Jordan to D. Carter (July 26, 2011), a true and correct copy of which is attached hereto as Exhibit F. She stated, "Al has reviewed the proposed changes and they are OK. You can file at anytime." *Id.* Once again, no concerns about the modified dispute resolution provisions were e pressed.

11. Later that day, I transmitted NVC Transmittal No. 8 to the Federal Communications Commission on behalf of Northern Valley. *See* Letter from G. David Carter to M. Dortch, Federal Communications Commission (July 26, 2011), a true and correct copy of which is attached hereto as E hibit G. NVC Transmittal No. 8, as filed, continued to include the following dispute resolution provision:

> 3.1.7 Billing Disputes
> 3.1.7.1 General
> (a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, "notice of a good faith dispute" is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.
>
> (b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted interstate telecommunications to the Company's network.

NVC Transmittal No. 8 (attached to E hibit G), First Revised Page No. 32. Transmittal No. 8 was filed on 15 days' notice to receive the "deemed lawful" protections afforded by 47 U.S.C. § 204(a)(3).

12. On August 2, 2011, west Communications Company, LLC ("Qwest") and Sprint Communications Company, L.P. ("Sprint") each filed a Petition to Reject, or in the Alternative, to Suspend and Investigate Northern Valley's Transmittal No. 8. A true and correct copy of Qwest's Petition is attached as Exhibit H, and a true and correct copy of Sprint's Petition is attached as E hibit I.

13. In seeking to have NVC Transmittal No. 8 rejected or suspended, west argued, *inter alia*,

> The *Sprint v. Northern Valley Order* held the prior version of Section 3.1.7.1(b) unreasonable because it required "everyone to whom Northern Valley sends an access bill" to pay it, "no matter what the circumstances," in order to dispute the charges. Northern Valley apparently is under the misimpression that it has appropriately limited the scope of the revised provision, in light of the *Sprint v. Northern Valley Order*, by restricting it to "disputed charges related to traffic in which the Buyer transmitted an interstate telecommunications to Northern Valley's] network." This restriction, however, is no limitation at all. . . . any entity receiving an access bill from Northern Valley inevitably will be an IXC, such as west, sending interstate intere change traffic to Northern Valley. . . . The Revised 2011 Tariff thus merely replicates the problem previously identified.
>
> This analysis is not affected by the parenthetical phrase in the Commission's observation that a disputed access bill would have to be paid, "no matter what the circumstances (including, for e ample, if no service were provided at all), in order to dispute a charge." That phrase cannot be read to suggest that a situation in which "no services were provided" is the *only* circumstance in which a payment re uirement would be held an unreasonable condition for disputing a charge. . . . There are obviously many other circumstances in which a payment re uirement would be an unreasonable condition for disputing a charge, such as an overcharge much higher than the tariffed rate or a charge not matching the service or for a much greater volume of service than was provided.
>
> Moreover, the fact that "the Buyer transmitted an interstate telecommunication[] to [Northern Valley's] network" hardly guarantees that "services were provided." As the *Qwest v. Northern Valley Order* and other cases demonstrate, tariffed competitive local exchange carrier ("CLEC") end office access charges are unreasonable for the processing of "an interstate telecommunications [transmitted] to" Northern Valley's network if the "telecommunication[] is received by a non-end user." . . . Thus, it would be unreasonable to require that a disputed access charge be paid with regard to interstate traffic transmitted to Northern Valley for delivery to a non-end user.

E hibit , west Petition at 4-6.

14. Sprint argued as follows:

> The Commission also found in *Sprint v. Northern Valley*] Northern Valley's "Billing Dispute provision unreasonable because it required customers to pay disputed amounts in full "prior to or at the time of submitting a good faith dispute." Northern Valley's proposed language is similarly unreasonable: "Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network. Thus, it is clear that customers would still have to pay the entire bill. Stated differently, payment will continue to be re uired to dispute a bill or any portion of the bill. And, to make matters worse, the bill need not be for any services that Northern Valley provides – let alone any services provided pursuant to tariff. . . . Because the proposed revisions to Section 3.1.7.1(b) are still in violation of *Sprint v. Northern Valley* , they must be rejected.

E hibit I, Sprint Petition at 3-4.

15. Northern Valley filed its response to the west and Sprint Petitions on August 5, 2011. *See* Letter from D. Carter to M. Dortch, FCC (Aug. 5, 2011), a true and correct copy of which is attached hereto as E hibit J. Northern Valley e plained that it made three revisions to dispute resolution procedures in the tariff:

- "First, Transmittal No. 8 removes that requirement for IXCs to submit a good faith dispute within 90 days."
- "Second, Transmittal No. 8 modifies the re uirement for customers to pay charges in all circumstances in order to initiate a good faith dispute. The revised language now provides that 'Buyer shall tender payment for any disputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network.' Transmittal No. 8 at § 3.1.7.1(b). The provision complies not only with the *Sprint v. Northern Valley Order*, but also the long line of Commission precedent and case law establishing that a LEC is entitled to demand payment for providing services, even if there is a billing dispute. *In re Tel-Central of Jefferson City, Mo., Inc. v. United Tel. of Mo., Inc.*, 4 FCC Rcd. 8338, 8339, 9 (1992) ("[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."); *In re Bus. WATS, Inc. v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) ("The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly

performed….”) (citing *In re MCI Telecomms. Corp., Am. Tel. and Tel. Co. & the Pac. Tel. & Tel. Co.*, 62 FCC.2d 703,   6 (1976)).   ere, Northern Valley's tariff has been clearly modified to exclude situations when there is a dispute about whether Northern Valley is, in fact, having interstate intere change traffic transmitted across its network. This modification prevents Northern Valley from using the payment re uirement in an unreasonable manner to demand payment when it is not, in fact, providing service, without erroneously interfering with its right – as provided by Commission precedent – to receive payment in the face of a dispute.”

- “Finally, Transmittal No. 8 removes the language providing that Northern Valley was to be the sole judge of the validity of disputes. It now provides that:

> The Company will evaluate the Buyer's dispute and notify the Buyer in writing of its determination of whether the dispute has been resolved in favor of or against the Buyer. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination.

Transmittal No. 8 at § 3.1.7.1(d).”

See Northern Valley Communication, LLC Response to   west Communications Company, LLC and Sprint Communications Company, LLP Petitions to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 8, at 8-9 (attached to E hibit J).

16. Northern Valley also explained that Qwest and Sprint's arguments misconstrued *Sprint v. Northern Valley* to “preclude[] Northern Valley from ever demanding payment when an IXC disputes a bill,” and that it would not be “reasonable to allow IXCs to avoid their payment obligations by proffering any dispute, however pretextual.” *Id.* at 10. Northern Valley asserted that “the revised dispute provisions strike the appropriate balance of allowing an IXC a full and fair opportunity to dispute a bill, while ensuring that it does so in good faith and without using its non-payment activities as an unfair bargaining tool.” *Id.*

17. The FCC did not act to reject or suspend Northern Valley's Transmittal No. 8, rather those changes became effective as scheduled on August 10, 2011. On August 12, 2011,

the Pricing Policy Division of the Wireline Competition Bureau released a public notice expressly rejecting Qwest's and Sprint's arguments. *See* Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 11-10, DA 11-1393 (Aug. 12, 2011), a true and correct copy of which is attached hereto as E hibit . As the FCC stated,

> W e conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to re uire rejection. Similarly, we conclude that the parties have not presented issues regarding the transmittals that raise significant uestions of lawfulness that re uire investigation of the tariff transmittals listed in this Report.

Id.

18. On January 11, 2012, my colleague atherine Barker Marshall filed a new federal tariff for GLCC in order to comply with the rate reductions mandated by the FCC's *In re Connect America Fund, Report and Order,* 26 FCC Rcd. 17663 (2011), which, *inter alia*, re uired competitive LECs that serve high-volume conference calling services to reduce their interstate access rates. The dispute resolution provision in GLCC's Tariff No. 2 is identical to Northern Valley's Transmittal No. 8. *See* Great Lakes Tariff No. 2, 3.1.7.1 (GLCC-41 in the Appendix to GLCC's Motion to Dismiss (ECF No. 17-3)).

19. GLCC's F.C.C. Tariff No. 2, Transmittal No. 2, was filed on 15 days' notice, in accordance with 47 U.S.C. 204(a)(3). It became effective as scheduled on January 26, 2012, without suspension or rejection. For this reason, the Pricing Policy Division's conclusion that Northern Valley's dispute resolution provision was not "unlawful as to require rejection" and did not "raise significant questions of lawfulness that require investigation of the tariff" is e ually applicable to the identical dispute resolution provisions in Great Lakes Tariff No. 2.

I declare under penalty of perjury that the foregoing is truthful and correct to the best of my knowledge, information, and belief.

E ecuted on: July 8, 2014

G. David Carter

G. David Carter

Carter, David

From: Carter, David
Sent: Wednesday, July 20, 2011 3:27 PM
To: 'pamela.arluk@fcc.gov'; 'Vienna Jordan'
Cc: Buntrock, Ross
Subject: NVC Transmittal No. 8 - 7.19.11 Draft
Attachments: NVC Transmittal No. 8 - 7.19.11 Draft.pdf

Pam:

Thanks for the call back, sorry I missed you. Per your voicemail, attached is a draft of Northern Valley's Transmittal No. 8, which would effectuate the changes directed by the Sprint v. Northern Valley order. Original Page 31 is also included in the attachment for ease of reference, but would be omitted from the filing, as it stays the same.

The draft is currently prepared with the anticipation that we would have it finalized and ready for filing on Monday.

Thanks and please let us know if you have any questions.

Regards,
David

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ACCESS SERVICE

C EC S EET

Title Page and Pages 1 through 47 of this Tariff are effective as of the date shown. Original and revised pages as named below contain all changes from the original Tariff that are in effect on the date hereof.

Page	**Revision**	**Page**	**Revision**	**Page**	**Revision**
Title		30	1st Revised		
Page	Original	30.1	Original		
1	5th Revised	31	Original		
2	Original	32	1st Revised		
3	Original	33	1st Revised		
4	Original	34	2nd Revised		
5	Original	34.1	Original		
6	Original	35	Original		
7	3rd Revised	36	Original		
8	3rd Revised	37	Original		
9	Original	38	Original		
10	Original	39	Original		
11	Original	40	Original		
12	Original	41	Original		
13	Original	42	Original		
14	Original	43	Original		
15	Original	44	Original		
16	Original	45	Original		
17	Original	46	Original		
18	Original	47	Original		
19	Original				
20	Original				
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24	Original				
25	Original				
26	Original				
27	Original				
28	Original				
29	1st Revised				
29.1	Original				
29.2	Original				
29.3	Original				

Pages included in current filing.

James Groft
2211 Eighth Avenue NE, Suite 1101
Aberdeen, SD 57401

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.2 Billing and Collection of Charges (Cont'd)

3.1.2.7 In addition to other penalties or fees, the Buyer will be assessed a charge of twenty-five dollars (25) for each check submitted by the Buyer to the Company which a financial institution refuses to honor for insufficient funds or a non-e istent account.

3.1.2.8 If Service is discontinued by the Company in accordance with Section 3.1.6 following, and later restored, restoration of Service will be subject to all applicable reconnection or reestablishment charges.

3.1.3 Advance Payments

To safeguard its interests, the Company may re uire a Buyer to make an Advance Payment before Services are furnished. The Advance Payment will not e ceed an amount e ual to the Nonrecurring Charge(s) and one month's charges for the Service. The Advance Payment will be credited to the Buyer's initial bill. An Advance Payment may be re uired in addition to a deposit.

3.1.4 Jurisdictional Reporting Re uirements

3.1.4.1 To determine the jurisdiction of a call, the Company compares the originating number information with the terminating number information. Traffic without sufficient call detail shall be that traffic for which the originating number information lacks a valid Charge Party Number or Calling Party Number.

3.1.4.2 The Buyer must indicate a projected Percent of Interstate Use (PIU) factor in a whole number (i.e., a number 0 - 100) when ordering Switched Access Service. When terminating call details are insufficient to determine the jurisdiction for the call, the Buyer may supply the projected PIU factor. The projected PIU factor will be used to apportion the terminating call minutes for which call details were insufficient to determine jurisdiction between the interstate and intrastate jurisdictions.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Re uirements (Cont'd)

3.1.4.3 When terminating call details are insufficient to determine the jurisdiction, and the Buyer does not supply a projected PIU factor, calls will be billed using a PIU of 50 (50 interstate 50 intrastate).

3.1.4.4 The Buyer may update the PIU factor on a uarterly basis. The Buyer shall forward to the Company a revised report, to be received no later than fourteen (14) days after the first of January, April, July and October. The revised report shall show the PIU factor for the most current data available, for each service arranged for interstate use. This data shall consist of at least three (3) and no more than twelve (12) consecutive months of data, ending no more than seventy-five (75) days earlier than the date the report is due (e.g., for the report due January 15th, the last month of data should be no earlier than October 31st). The updated PIU factor shall be based on call detail records. The PIU factor can be based on a statistically valid sample. The PIU factor reported in January, April, July and October will be effective on the bill date of each such month and will serve as the basis for subse uent monthly billing pending the receipt of a revised PIU report.

(a) No prorating or back billing will be done based on the jurisdictional report. owever, usage will be billed utilizing the interstate percentage that was in effect at the time the usage was generated.

(b) The Buyer shall maintain and retain the work papers that show how the interstate percentage was determined and a summary derived from the actual call detail records for a minimum twelve (12) month period which statistically substantiates each interstate percentage provided to the Company. This summary at a minimum shall include month, year, state, traffic type (e.g., originating, terminating, 8XX, etc.) and service type. The Company may re uest the work papers and summary in support of the Buyer's projected PIU factor.

[x] ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Re uirements (Cont'd)

3.1.4.5 If a billing dispute arises concerning the projected interstate percentage, the Company will ask the Buyer to provide the data the Buyer uses to determine the projected PIU by sending a letter to the Buyer (by certified U.S. Mail, return receipt re uested) re uesting that the Buyer contact the Company to discuss and e plain their report within thirty (30) days of the Company s re uest. If no response is received from the Buyer, the Company will send a letter to the Buyer (by certified U.S. Mail, return receipt re uested) re uesting the work papers and any support dating used by the Buyer to substantiate the most recent interstate percentage. The re uested information must be submitted by the Buyer to the Company within thirty (30) days after receipt of the certified letter.

(a) If the Buyer submits the work papers and summary as re uested, the Company will review this information within thirty (30) days after receipt of the Buyer s information.

(1) If after review of the documentation, the Company and the Buyer establish a revised interstate percentage, the Company will begin using that percentage with the ne t billing period.

(2) If the Company and the Buyer do not establish a revised interstate percentage, the Company will begin the procedures as set forth below to conduct an audit.

(b) If no response is received from the Buyer, the Company will begin the auditing procedures as set forth below.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Re uirements (Cont'd)

3.1.4.6 When jurisdictional reports are not provided by the Buyer or a billing dispute arises, the Company may re uest an audit. The audit procedures and responsible party(ies) for payment of audit e penses will be determined as follows:

- If the Company and the Buyer mutually agree upon an independent auditing firm and the party(ies) agree to e ually share in the payment of audit e penses, both the Company and the Buyer will be bound by such agreement or
- The Buyer may select an independent auditing firm and pay all audit e penses.
- If the audit is not conducted as set forth preceding, the Company may select an independent auditing firm and pay all e penses.

3.1.4.7 The Company will adjust the Buyer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the uarter the audit is completed, the usage for the uarter prior to completion of the audit and the usage for the two (2) uarters following the completion of the audit. After that time, the Buyer may report a revised PIU. The Company will implement the revised interstate percentage to the ne t billing period or uarterly report date, whichever is first.

[x] ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits

3.1.5.1 To safeguard its interests, the Company may re uire a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit will be re uired under the following conditions:

(a) Buyer has had no previous Access Service or

(b) Buyer does not have verifiable credit the Company or

(c) Buyer has had previous verifiable Access Service with the Company but has an outstanding and unpaid bill for Access Service or has not established satisfactory credit. Satisfactory credit for an Access Service Buyer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment.

The deposit will not e ceed an amount e ual to:

(a) two months' charges for a Service or facility which has a minimum payment period of one month or

(b) the charges that would apply for the minimum payment period for a Service or facility which has a minimum payment period of more than one month e cept that the deposit may include an additional amount in the event that a termination charge is applicable.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits (Cont'd)

3.1.5.2 An initial deposit or an additional deposit will be re uired of an e isting Buyer when high risk is indicated and e isting security is insufficient. Such re uirement will be imposed when payment history includes a suspension of service for nonpayment, or includes more than one notification of intention to suspend service for nonpayment during the previous twelve month period.

(a) Any demand for a deposit from an e isting Buyer is due and payable within ten days after the re uirement is imposed. This demand shall be in writing. If said deposit or installment thereof, as appropriate, is not paid within the aforementioned time frame, the Company may suspend service of the Buyer without further notice.

(b) When it is determined that a deposit is re uired under the conditions specified above, the Buyer may, in lieu of or in addition to making the deposit, arrange for an acceptable third party to guarantee payment of his charges by e ecuting on his behalf a Guarantee of Payment Agreement with the Company. An acceptable third party guarantor for Access Service is a current Buyer with at least two years continuous service, whose payment history for the most recent twelve month period is satisfactory.

3.1.5.3 When a Service is discontinued, the amount of a deposit, if any, will be applied to the Buyer's account and any credit balance remaining will be refunded.

3.1.5.4 Simple Interest shall accrue on a deposit and shall be paid at the time the deposit is either refunded or applied to the Buyer's final bill for service. Simple Interest will be applied for the month or portion of a month from the date the Buyer deposit is received by the Company to and including the date such deposit is credited to the Buyer's account or the date the deposit is refunded by the Company.

3.1.5.5 Such a deposit will be refunded or credited to the Buyer's account after a one-year, prompt-payment record is established.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits (Cont'd)

3.1.5.6 In the event the provision of all service to the Buyer is terminated and the Company maintains a cash deposit from the Buyer, the deposit and any accrued, uncredited Simple Interest will be applied to any outstanding sums owed to the Company, and any remaining balance will be returned to the Buyer.

(a) The Buyer will receive Simple Interest for each month or portion thereof that a deposit is held.

3.1.6 Discontinuance of Service

3.1.6.1 Upon nonpayment of any amounts owing to the Company, the Company may by giving ten days' prior written notice to the Buyer, discontinue or suspend Service without incurring any liability.

3.1.6.2 In the Company's sole discretion, upon violation of any of the other material terms or conditions for furnishing Service, the Company may, by giving 10 days' prior notice in writing to the Buyer (or such shorter notice as may be provided elsewhere in this Tariff), discontinue or suspend Service without incurring any liability if such violation continues during the period.

3.1.6.3 Upon condemnation of any material portion of the facilities used by the Company to provide Service to a Buyer or if a casualty renders all or any material portion of such facilities inoperable beyond feasible repair, the Company, by giving notice to the Buyer, may discontinue or suspend Service without incurring any liability.

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.6 Discontinuance of Service (Cont'd)

3.1.6.4 Upon any governmental prohibition or re uired alteration of the Service(s) to be provided or any violation of any applicable law or regulation, the Company may immediately discontinue Service without incurring any liability.

3.1.6.5 Upon the Company's discontinuance of Service to the Buyer under the terms of this Tariff, the Company, in addition to all other remedies that may be available to the Company at law or in e uity or under any other provision of this tariff, may declare all future monthly and other charges which would have been payable by the Buyer during the remainder of the term for which such Service(s) would have otherwise been provided to the Buyer to be immediately due and payable.

3.1.7 Billing Disputes

3.1.7.1 General

(a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, notice of a good faith dispute is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.

(b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

ACCESS SERVICE

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.1 General (Cont'd)

(c) If payment of the originally billed amount is not made when due whether or not a notice of dispute has been submitted Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5 per month on the total unpaid balance.

(d) The Company will evaluate the Buyer's dispute and notify the Buyer in writing of its determination of whether the dispute has been resolved in favor of or against the Buyer. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination.

3.1.7.2 Late Payment Fee

All portions of the bill, whether disputed or undisputed, must be paid by the payment due date to avoid assessment of a Late Payment Fee.

3.1.7.3 Adjustments or Refunds to the Buyer

(a) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as re uired by this Tariff, the Company will credit the Buyer's account for any overpayment by the Buyer, together with Simple Interest, in the billing period following the resolution of the dispute.

(b) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as re uired by this Tariff, but canceled the service, the Company will issue a refund of any overpayment by the Buyer, together with Simple Interest.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.3 Adjustments or Refunds to the Buyer (Cont'd)

(c) All adjustments or refunds provided by the Company to the Buyer at the Buyer's re uest, or provided by the Company to the Buyer by way of compromise of a billing dispute, and which are accepted by the Buyer, are final and constitute full satisfaction, settlement, and/or compromise of all of the Buyer's claims for the billing period for which the adjustment or refund was issued.

3.1.7.4 Attorneys' Fees

In the event that the Company pursues and prevails on a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, including refusal to pay for services originating or terminating to a Volume End User, Buyer shall be liable for the payment of the Company's reasonable attorneys' fees e pended in collecting those unpaid amounts.

3.2 Access Billing

3.2.1 Billing Standards

3.2.1.1 The Company shall produce access bills in general conformance with accepted industry standards.

3.2.1.2 An access bill is comprised of one or more billing elements, including usage sensitive charges, distance sensitive charges, flat-rated charges, individual-case-based (ICB) charges, and Nonrecurring or special miscellaneous charges that may be appropriate.

Some material previously found on this page has been moved to page 34.1.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

Carter, David

From: Carter, David
Sent: Wednesday, July 20, 2011 3:41 PM
To: 'Pamela Arluk'; 'Vienna Jordan'
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Pam,

Yes, we do have until Thursday to file. So, if it takes until Tuesday to get final word, that should be fine. Certainly, if you or Vienna have any concerns that you would like to discuss before Al is able to do his review, please let us know.

Best,
David

David Carter
Attorney

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1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.8972 Direct | 202.857.6395 Fax
carter.david@arentfox.com | www.arentfox.com

-----Original Message-----
From: Pamela Arluk [mailto:Pamela.Arluk@fcc.gov]
Sent: Wednesday, July 20, 2011 3:36 PM
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Cc: Buntrock, Ross
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Hi David--thanks! You have until next Thursday to file correct? It may make sense to at least wait until Tuesday. Al is out of the office through Monday and I think it would be good to get his sign off before you file. However, if the deadline is Monday, there's nothing that can be done.

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Pam:

Thanks for the call back, sorry I missed you. Per your voicemail, attached is a draft of Northern Valley's Transmittal No. 8, which would effectuate the changes directed by the Sprint v. Northern Valley order. Original Page 31 is also included in the attachment for ease of reference, but would be omitted from the filing, as it stays the same.

The draft is currently prepared with the anticipation that we would have it finalized and ready for filing on Monday.

Thanks and please let us know if you have any questions.

Regards,
David

David Carter
Attorney

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1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.8972 Direct | 202.857.6395 Fax
carter.david@arentfox.com | www.arentfox.com

Carter, David

From: Vienna Jordan [Vienna.Jordan@fcc.gov]
Sent: Monday, July 25, 2011 2:13 PM
To: Carter, David
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Hi David

Few comments on proposed draft:

On Original Pages 29.1, 29.2 and 29.3, the code should be Nx and the footnote should read - "(x) Issued under authority of Commission Order 11-11 to be in compliance with the Sprint v Northern Valley Order."

On Original Page 30.1 - Add additional footnote that states - "Certain material on this page were previously on Page 30.

Do not file Page 31 because there are no changes.

Thank you!
Vienna

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Carter, David

From: Carter, David
Sent: Monday, July 25, 2011 2:34 PM
To: 'Vienna Jordan'
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft
Attachments: NVC Transmittal No. 8 - 7.25.11 Draft.pdf

Vienna,

Thank you for your email and comments. I've included a revised draft -- not set up for filing tomorrow -- and wanted to confirm that the changes are as you requested.

Do your comments also reflect input from Al and Pam, or should we continue to await further guidance regarding the substance of our changes?

Thank you,
David

David Carter
Attorney

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C EC S EET

Title Page and Pages 1 through 47 of this Tariff are effective as of the date shown. Original and revised pages as named below contain all changes from the original Tariff that are in effect on the date hereof.

Page	Revision	Page	Revision	Page	Revision
Title		30	1st Revised		
Page	Original	30.1	Original		
1	5th Revised	31	Original		
2	Original	32	1st Revised		
3	Original	33	1st Revised		
4	Original	34	2nd Revised		
5	Original	34.1	Original		
6	Original	35	Original		
7	3rd Revised	36	Original		
8	3rd Revised	37	Original		
9	Original	38	Original		
10	Original	39	Original		
11	Original	40	Original		
12	Original	41	Original		
13	Original	42	Original		
14	Original	43	Original		
15	Original	44	Original		
16	Original	45	Original		
17	Original	46	Original		
18	Original	47	Original		
19	Original				
20	Original				
21	Original				
22	Original				
23	Original				
24	Original				
25	Original				
26	Original				
27	Original				
28	Original				
29	1st Revised				
29.1	Original				
29.2	Original				
29.3	Original				

Pages included in current filing.

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.2 Billing and Collection of Charges (Cont'd)

3.1.2.7 In addition to other penalties or fees, the Buyer will be assessed a charge of twenty-five dollars (25) for each check submitted by the Buyer to the Company which a financial institution refuses to honor for insufficient funds or a non-e istent account.

3.1.2.8 If Service is discontinued by the Company in accordance with Section 3.1.6 following, and later restored, restoration of Service will be subject to all applicable reconnection or reestablishment charges.

3.1.3 Advance Payments

To safeguard its interests, the Company may re uire a Buyer to make an Advance Payment before Services are furnished. The Advance Payment will not e ceed an amount e ual to the Nonrecurring Charge(s) and one month's charges for the Service. The Advance Payment will be credited to the Buyer's initial bill. An Advance Payment may be re uired in addition to a deposit.

3.1.4 Jurisdictional Reporting Re uirements

3.1.4.1 To determine the jurisdiction of a call, the Company compares the originating number information with the terminating number information. Traffic without sufficient call detail shall be that traffic for which the originating number information lacks a valid Charge Party Number or Calling Party Number.

3.1.4.2 The Buyer must indicate a projected Percent of Interstate Use (PIU) factor in a whole number (i.e., a number 0 - 100) when ordering Switched Access Service. When terminating call details are insufficient to determine the jurisdiction for the call, the Buyer may supply the projected PIU factor. The projected PIU factor will be used to apportion the terminating call minutes for which call details were insufficient to determine jurisdiction between the interstate and intrastate jurisdictions.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

ACCESS SERVICE

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Re uirements (Cont'd)

3.1.4.3 When terminating call details are insufficient to determine the jurisdiction, and the Buyer does not supply a projected PIU factor, calls will be billed using a PIU of 50 (50 interstate 50 intrastate). N

3.1.4.4 The Buyer may update the PIU factor on a uarterly basis. The Buyer shall forward to the Company a revised report, to be received no later than fourteen (14) days after the first of January, April, July and October. The revised report shall show the PIU factor for the most current data available, for each service arranged for interstate use. This data shall consist of at least three (3) and no more than twelve (12) consecutive months of data, ending no more than seventy-five (75) days earlier than the date the report is due (e.g., for the report due January 15th, the last month of data should be no earlier than October 31st). The updated PIU factor shall be based on call detail records. The PIU factor can be based on a statistically valid sample. The PIU factor reported in January, April, July and October will be effective on the bill date of each such month and will serve as the basis for subse uent monthly billing pending the receipt of a revised PIU report.

(a) No prorating or back billing will be done based on the jurisdictional report. owever, usage will be billed utilizing the interstate percentage that was in effect at the time the usage was generated.

(b) The Buyer shall maintain and retain the work papers that show how the interstate percentage was determined and a summary derived from the actual call detail records for a minimum twelve (12) month period which statistically substantiates each interstate percentage provided to the Company. This summary at a minimum shall include month, year, state, traffic type (e.g., originating, terminating, 8XX, etc.) and service type. The Company may re uest the work papers and summary in support of the Buyer's projected PIU factor. N

[x] ***Issued under authority of Commission Order 11-111 to be in compliance with the Sprint v Northern Valley Order.***

James Groft
2211 Eighth Avenue NE, Suite 1101
Aberdeen, SD 57401

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Re uirements (Cont'd)

3.1.4.5 If a billing dispute arises concerning the projected interstate percentage, the Company will ask the Buyer to provide the data the Buyer uses to determine the projected PIU by sending a letter to the Buyer (by certified U.S. Mail, return receipt re uested) re uesting that the Buyer contact the Company to discuss and e plain their report within thirty (30) days of the Company s re uest. If no response is received from the Buyer, the Company will send a letter to the Buyer (by certified U.S. Mail, return receipt re uested) re uesting the work papers and any support dating used by the Buyer to substantiate the most recent interstate percentage. The re uested information must be submitted by the Buyer to the Company within thirty (30) days after receipt of the certified letter. N

(a) If the Buyer submits the work papers and summary as re uested, the Company will review this information within thirty (30) days after receipt of the Buyer s information.

(1) If after review of the documentation, the Company and the Buyer establish a revised interstate percentage, the Company will begin using that percentage with the ne t billing period.

(2) If the Company and the Buyer do not establish a revised interstate percentage, the Company will begin the procedures as set forth below to conduct an audit.

(b) If no response is received from the Buyer, the Company will begin the auditing procedures as set forth below. N

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3. <u>PA MENT AND BILLING (Cont'd)</u>

3.1 <u>Payment Arrangements (Cont'd)</u>

<u>3.1.4 Jurisdictional Reporting Re uirements (Cont'd)</u>

3.1.4.6 When jurisdictional reports are not provided by the Buyer or a billing dispute arises, the Company may re uest an audit. The audit procedures and responsible party(ies) for payment of audit e penses will be determined as follows: N

- If the Company and the Buyer mutually agree upon an independent auditing firm and the party(ies) agree to e ually share in the payment of audit e penses, both the Company and the Buyer will be bound by such agreement or
- The Buyer may select an independent auditing firm and pay all audit e penses.
- If the audit is not conducted as set forth preceding, the Company may select an independent auditing firm and pay all e penses.

3.1.4.7 The Company will adjust the Buyer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the uarter the audit is completed, the usage for the uarter prior to completion of the audit and the usage for the two (2) uarters following the completion of the audit. After that time, the Buyer may report a revised PIU. The Company will implement the revised interstate percentage to the ne t billing period or uarterly report date, whichever is first. N

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3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits

3.1.5.1 To safeguard its interests, the Company may re uire a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit will be re uired under the following conditions:

(a) Buyer has had no previous Access Service or

(b) Buyer does not have verifiable credit the Company or

(c) Buyer has had previous verifiable Access Service with the Company but has an outstanding and unpaid bill for Access Service or has not established satisfactory credit. Satisfactory credit for an Access Service Buyer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment.

The deposit will not e ceed an amount e ual to:

(a) two months' charges for a Service or facility which has a minimum payment period of one month or

(b) the charges that would apply for the minimum payment period for a Service or facility which has a minimum payment period of more than one month e cept that the deposit may include an additional amount in the event that a termination charge is applicable.

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3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits (Cont'd)

3.1.5.2 An initial deposit or an additional deposit will be re uired of an e isting Buyer when high risk is indicated and e isting security is insufficient. Such re uirement will be imposed when payment history includes a suspension of service for nonpayment, or includes more than one notification of intention to suspend service for nonpayment during the previous twelve month period.

(a) Any demand for a deposit from an e isting Buyer is due and payable within ten days after the re uirement is imposed. This demand shall be in writing. If said deposit or installment thereof, as appropriate, is not paid within the aforementioned time frame, the Company may suspend service of the Buyer without further notice.

(b) When it is determined that a deposit is re uired under the conditions specified above, the Buyer may, in lieu of or in addition to making the deposit, arrange for an acceptable third party to guarantee payment of his charges by e ecuting on his behalf a Guarantee of Payment Agreement with the Company. An acceptable third party guarantor for Access Service is a current Buyer with at least two years continuous service, whose payment history for the most recent twelve month period is satisfactory.

3.1.5.3 When a Service is discontinued, the amount of a deposit, if any, will be applied to the Buyer's account and any credit balance remaining will be refunded.

3.1.5.4 Simple Interest shall accrue on a deposit and shall be paid at the time the deposit is either refunded or applied to the Buyer's final bill for service. Simple Interest will be applied for the month or portion of a month from the date the Buyer deposit is received by the Company to and including the date such deposit is credited to the Buyer's account or the date the deposit is refunded by the Company.

3.1.5.5 Such a deposit will be refunded or credited to the Buyer's account after a one-year, prompt-payment record is established.

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3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.6 Discontinuance of Service (Cont'd)

3.1.6.4 Upon any governmental prohibition or re uired alteration of the Service(s) to be provided or any violation of any applicable law or regulation, the Company may immediately discontinue Service without incurring any liability.

3.1.6.5 Upon the Company's discontinuance of Service to the Buyer under the terms of this Tariff, the Company, in addition to all other remedies that may be available to the Company at law or in e uity or under any other provision of this tariff, may declare all future monthly and other charges which would have been payable by the Buyer during the remainder of the term for which such Service(s) would have otherwise been provided to the Buyer to be immediately due and payable.

3.1.7 Billing Disputes

3.1.7.1 General

(a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, notice of a good faith dispute is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.

(b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

ACCESS SERVICE

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.1 General (Cont'd)

(c) If payment of the originally billed amount is not made when due whether or not a notice of dispute has been submitted Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5 per month on the total unpaid balance.

(d) The Company will evaluate the Buyer's dispute and notify the Buyer in writing of its determination of whether the dispute has been resolved in favor of or against the Buyer. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination.

3.1.7.2 Late Payment Fee

All portions of the bill, whether disputed or undisputed, must be paid by the payment due date to avoid assessment of a Late Payment Fee.

3.1.7.3 Adjustments or Refunds to the Buyer

(a) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as re uired by this Tariff, the Company will credit the Buyer's account for any overpayment by the Buyer, together with Simple Interest, in the billing period following the resolution of the dispute.

(b) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as re uired by this Tariff, but canceled the service, the Company will issue a refund of any overpayment by the Buyer, together with Simple Interest.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PA MENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.3 Adjustments or Refunds to the Buyer (Cont'd)

(c) All adjustments or refunds provided by the Company to the Buyer at the Buyer's re uest, or provided by the Company to the Buyer by way of compromise of a billing dispute, and which are accepted by the Buyer, are final and constitute full satisfaction, settlement, and/or compromise of all of the Buyer's claims for the billing period for which the adjustment or refund was issued.

3.1.7.4 Attorneys' Fees

In the event that the Company pursues and prevails on a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, including refusal to pay for services originating or terminating to a Volume End User, Buyer shall be liable for the payment of the Company's reasonable attorneys' fees e pended in collecting those unpaid amounts.

3.2 Access Billing

3.2.1 Billing Standards

3.2.1.1 The Company shall produce access bills in general conformance with accepted industry standards.

3.2.1.2 An access bill is comprised of one or more billing elements, including usage sensitive charges, distance sensitive charges, flat-rated charges, individual-case-based (ICB) charges, and Nonrecurring or special miscellaneous charges that may be appropriate.

Some material previously found on this page has been moved to page 34.1.

[x] ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

EXHIBIT E

Carter, David

From: Vienna Jordan [Vienna.Jordan@fcc.gov]
Sent: Monday, July 25, 2011 3:01 PM
To: Carter, David
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

David

My changes do not reflect comments from Al. He will be here tomorrow and I will get them to him very early in the morning. Pam is ok with what we've done.

Vienna

-----Original Message-----
From: Carter, David [mailto:Carter.David@ARENTFOX.COM]
Sent: Monday, July 25, 2011 2:34 PM
To: Vienna Jordan
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Vienna,

Thank you for your email and comments. I've included a revised draft -- not set up for filing tomorrow -- and wanted to confirm that the changes are as you requested.

Do your comments also reflect input from Al and Pam, or should we continue to await further guidance regarding the substance of our changes?

Thank you,
David

David Carter
Attorney

Arent Fox LLP | Attorneys at Law
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.8972 Direct | 202.857.6395 Fax
carter.david@arentfox.com | www.arentfox.com

-----Original Message-----
From: Vienna Jordan [mailto:Vienna.Jordan@fcc.gov]
Sent: Monday, July 25, 2011 2:13 PM
To: Carter, David

Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Hi David

Few comments on proposed draft:

On Original Pages 29.1, 29.2 and 29.3, the code should be Nx and the footnote should read - "(x) Issued under authority of Commission Order 11-11 to be in compliance with the Sprint v Northern Valley Order."

On Original Page 30.1 - Add additional footnote that states - "Certain material on this page were previously on Page 30.

Do not file Page 31 because there are no changes.

Thank you!
Vienna

-----Original Message-----
From: Carter, David [mailto:Carter.David@ARENTFOX.COM]
Sent: Wednesday, July 20, 2011 3:41 PM
To: Pamela Arluk; Vienna Jordan
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Pam,

Yes, we do have until Thursday to file. So, if it takes until Tuesday to get final word, that should be fine. Certainly, if you or Vienna have any concerns that you would like to discuss before Al is able to do his review, please let us know.

Best,
David

David Carter
Attorney

Arent Fox LLP | Attorneys at Law
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.8972 Direct | 202.857.6395 Fax
carter.david@arentfox.com | www.arentfox.com

-----Original Message-----
From: Pamela Arluk [mailto:Pamela.Arluk@fcc.gov]
Sent: Wednesday, July 20, 2011 3:36 PM
To: Carter, David; Vienna Jordan
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Hi David--thanks! You have until next Thursday to file correct? It may make sense to at least wait until Tuesday. Al is out of the office through Monday and I think it would be good to get his sign off before you file. However, if the deadline is Monday, there's nothing that can be done.

-----Original Message-----
From: Carter, David [mailto:Carter.David@ARENTFOX.COM]
Sent: Wed 7/20/2011 3:27 PM
To: Pamela Arluk; Vienna Jordan
Cc: Buntrock, Ross
Subject: NVC Transmittal No. 8 - 7.19.11 Draft

Pam:

Thanks for the call back, sorry I missed you. Per your voicemail, attached is a draft of Northern Valley's Transmittal No. 8, which would effectuate the changes directed by the Sprint v. Northern Valley order.
Original Page 31 is also included in the attachment for ease of reference, but would be omitted from the filing, as it stays the same.

The draft is currently prepared with the anticipation that we would have it finalized and ready for filing on Monday.

Thanks and please let us know if you have any questions.

Regards,
David

David Carter
Attorney

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1050 Connecticut Avenue, NW
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IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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EXHIBIT F

Carter, David

From: Vienna Jordan [Vienna.Jordan@fcc.gov]
Sent: Tuesday, July 26, 2011 10:33 AM
To: Carter, David
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Good Morning David

Al has reviewed the proposed changes and they are OK. You can file at anytime. If possible, please let me know when you file.

Thank you!
Vienna

-----Original Message-----
From: Carter, David [mailto:Carter.David@ARENTFOX.COM]
Sent: Monday, July 25, 2011 3:09 PM
To: Vienna Jordan
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

Thank you.

David Carter
Attorney

Arent Fox LLP | Attorneys at Law
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.8972 Direct | 202.857.6395 Fax
carter.david@arentfox.com | www.arentfox.com

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Sent: Monday, July 25, 2011 3:01 PM
To: Carter, David
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

David

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Sent: Monday, July 25, 2011 2:34 PM
To: Vienna Jordan
Cc: Buntrock, Ross
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Do your comments also reflect input from Al and Pam, or should we continue to await further guidance regarding the substance of our changes?

Thank you,
David

David Carter
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To: Pamela Arluk; Vienna Jordan
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Best,
David

David Carter
Attorney

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carter.david@arentfox.com | www.arentfox.com

-----Original Message-----
From: Pamela Arluk [mailto:Pamela.Arluk@fcc.gov]
Sent: Wednesday, July 20, 2011 3:36 PM
To: Carter, David; Vienna Jordan
Cc: Buntrock, Ross
Subject: RE: NVC Transmittal No. 8 - 7.19.11 Draft

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Subject: NVC Transmittal No. 8 - 7.19.11 Draft

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Regards,
David

David Carter
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Arent Fox LLP / **Washington, DC** / New York, NY / Los Angeles, CA

Arent Fox

July 26, 2011

Transmittal No. 8

G. David Carter
Attorney
202.857.8972 DIRECT
202.857.6395 FAX
carter.david@arentfox.com

Filing Made Pursuant to 47 USC §204(a)(3) – Filed on 15 Days' Notice

VIA HAND DELIVERY AND FEDERAL EXPRESS
Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Northern Valley Communications, LLC -- Revisions to FCC Tariff No. 3
FRN: 0004364022

Dear Ms. Dortch:

Enclosed for filing, please find revisions to Northern Valley Communications, LLC's ("Northern Valley") FCC Tariff No. 3. Pursuant to the Commission's Memorandum Opinion and Order in *Sprint Communications Company, LP v. Northern Valley Communications, LLC*, File No. EB-11-MD-003, and consistent with Rule 1.106(n), 47 C.F.R. § 1.106(n), this filing reflects changes certain terms and condition in Northern Valley's tariff, including provisions governing Jurisdictional Report Requirements, Deposits, Billing Disputes, and Attorneys' Fees. This filing is made pursuant to §204(a)(3) of the Act, and is filed on fifteen days' notice, with an issue date of July 26, 2011 and an effective date of August 10, 2011.

Please note that Northern Valley may seek review of the Orders that direct these modifications. Northern Valley reserves all rights and does not intend to waive its arguments that its tariff, as previously filed, was fully lawful and represented Northern Valley's preferred method of seeking intercarrier compensation.

The Company is a non-dominant carrier and therefore supporting documentation under Part 61.38 of the Commission's Rules is not required.

In accordance with Part 61.20(b)(1) of the Commission's Rules, this original Transmittal Letter, without attachments, FCC Form 159 and a check in the amount of $845.00 have been sent via overnight delivery to U.S. Bank in St. Louis, MO as of this date.

A CD-ROM containing an electronic version of this filing is also included, pursuant to Part 61.20(c). Further, a copy of this filing and CD-ROM has been submitted to Best Copy and Printing, Inc., the Commission's printing service.

Arent Fox

Questions relating to this filing should be directed to:

G. David Carter
Arent Fox, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 857-8972
E-Mail: carter.david@arentfox.com

Please date stamp the duplicate of this filing and return to the undersigned in the enclosed envelope.

Respectfully submitted,

G. David Carter

G. David Carter

Enclosure

cc *(by hand delivery)*: Best Copy Services, Inc.
Chief, Tariff Bureau, Federal Communications Commission

cc *(by email)*: Pamela Arluk
Vienna Jordan
Michael B. Fingerhut, Sprint Communications Company, LP
Marc B. Goldman, Jenner & Block LLP
Russell P. Hanser, David H. Solomon; Wilkinson Barker Knauer, LLP
Ross A. Buntrock
Katherine E. Barker Marshall

ACCESS SERVICE

CHECK SHEET

Title Page and Pages 1 through 47 of this Tariff are effective as of the date shown. Original and revised pages as named below contain all changes from the original Tariff that are in effect on the date hereof.

Page	Revision	Page	Revision	Page	Revision
Title Page	Original	30	1st Revised*		
1	5th Revised*	30.1	Original*		
2	Original	31	Original		
3	Original	32	1st Revised*		
4	Original	33	1st Revised*		
5	Original	34	2nd Revised*		
6	Original	34.1	Original		
7	3rd Revised	35	Original		
8	3rd Revised	36	Original		
9	Original	37	Original		
10	Original	38	Original		
11	Original	39	Original		
12	Original	40	Original		
13	Original	41	Original		
14	Original	42	Original		
15	Original	43	Original		
16	Original	44	Original		
17	Original	45	Original		
18	Original	46	Original		
19	Original	47	Original		
20	Original				
21	Original				
22	Original				
23	Original				
24	Original				
25	Original				
26	Original				
27	Original				
28	Original				
29	1st Revised*				
29.1	Original*				
29.2	Original*				
29.3	Original*				

* Pages included in current filing.

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.2 Billing and Collection of Charges (Cont'd)

3.1.2.7 In addition to other penalties or fees, the Buyer will be assessed a charge of twenty-five dollars ($25) for each check submitted by the Buyer to the Company which a financial institution refuses to honor for insufficient funds or a non-existent account.

3.1.2.8 If Service is discontinued by the Company in accordance with Section 3.1.6 following, and later restored, restoration of Service will be subject to all applicable reconnection or reestablishment charges.

3.1.3 Advance Payments

To safeguard its interests, the Company may require a Buyer to make an Advance Payment before Services are furnished. The Advance Payment will not exceed an amount equal to the Nonrecurring Charge(s) and one month's charges for the Service. The Advance Payment will be credited to the Buyer's initial bill. An Advance Payment may be required in addition to a deposit.

3.1.4 Jurisdictional Reporting Requirements

3.1.4.1 To determine the jurisdiction of a call, the Company compares the originating number information with the terminating number information. Traffic without sufficient call detail shall be that traffic for which the originating number information lacks a valid Charge Party Number or Calling Party Number. x

3.1.4.2 The Buyer must indicate a projected Percent of Interstate Use (PIU) factor in a whole number (i.e., a number 0 - 100) when ordering Switched Access Service. When terminating call details are insufficient to determine the jurisdiction for the call, the Buyer may supply the projected PIU factor. The projected PIU factor will be used to apportion the terminating call minutes for which call details were insufficient to determine jurisdiction between the interstate and intrastate jurisdictions. x

(x) *Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.*

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Requirements (Cont'd)

3.1.4.3 When terminating call details are insufficient to determine the jurisdiction, and the Buyer does not supply a projected PIU factor, calls will be billed using a PIU of 50 (50% interstate – 50% intrastate). Nx

3.1.4.4 The Buyer may update the PIU factor on a quarterly basis. The Buyer shall forward to the Company a revised report, to be received no later than fourteen (14) days after the first of January, April, July and October. The revised report shall show the PIU factor for the most current data available, for each service arranged for interstate use. This data shall consist of at least three (3) and no more than twelve (12) consecutive months' of data, ending no more than seventy-five (75) days earlier than the date the report is due (e.g., for the report due January 15th, the last month of data should be no earlier than October 31st). The updated PIU factor shall be based on call detail records. The PIU factor can be based on a statistically valid sample. The PIU factor reported in January, April, July and October will be effective on the bill date of each such month and will serve as the basis for subsequent monthly billing pending the receipt of a revised PIU report.

(a) No prorating or back billing will be done based on the jurisdictional report. However, usage will be billed utilizing the interstate percentage that was in effect at the time the usage was generated.

(b) The Buyer shall maintain and retain the work papers that show how the interstate percentage was determined and a summary derived from the actual call detail records for a minimum twelve (12) month period which statistically substantiates each interstate percentage provided to the Company. This summary at a minimum shall include month, year, state, traffic type (e.g., originating, terminating, 8XX, etc.) and service type. The Company may request the work papers and summary in support of the Buyer's projected PIU factor. Nx

[x] *Issued under authority of Commission Order 11-111 to be in compliance with the Sprint v Northern Valley Order.*

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Requirements (Cont'd)

3.1.4.5 If a billing dispute arises concerning the projected interstate percentage, the Company will ask the Buyer to provide the data the Buyer uses to determine the projected PIU by sending a letter to the Buyer (by certified U.S. Mail, return receipt requested) requesting that the Buyer contact the Company to discuss and explain their report within thirty (30) days of the Company's request. If no response is received from the Buyer, the Company will send a letter to the Buyer (by certified U.S. Mail, return receipt requested) requesting the work papers and any support dating used by the Buyer to substantiate the most recent interstate percentage. The requested information must be submitted by the Buyer to the Company within thirty (30) days after receipt of the certified letter. Nx

(a) If the Buyer submits the work papers and summary as requested, the Company will review this information within thirty (30) days after receipt of the Buyer's information.

(1) If after review of the documentation, the Company and the Buyer establish a revised interstate percentage, the Company will begin using that percentage with the next billing period.

(2) If the Company and the Buyer do not establish a revised interstate percentage, the Company will begin the procedures as set forth below to conduct an audit.

(b) If no response is received from the Buyer, the Company will begin the auditing procedures as set forth below. Nx

[x] ***Issued under authority of Commission Order 11-111 to be in compliance with the Sprint v Northern Valley Order.***

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.4 Jurisdictional Reporting Requirements (Cont'd)

3.1.4.6 When jurisdictional reports are not provided by the Buyer or a billing dispute arises, the Company may request an audit. The audit procedures and responsible party(ies) for payment of audit expenses will be determined as follows: Nx

- If the Company and the Buyer mutually agree upon an independent auditing firm and the party(ies) agree to equally share in the payment of audit expenses, both the Company and the Buyer will be bound by such agreement; or
- The Buyer may select an independent auditing firm and pay all audit expenses.
- If the audit is not conducted as set forth preceding, the Company may select an independent auditing firm and pay all expenses.

3.1.4.7 The Company will adjust the Buyer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to completion of the audit and the usage for the two (2) quarters following the completion of the audit. After that time, the Buyer may report a revised PIU. The Company will implement the revised interstate percentage to the next billing period or quarterly report date, whichever is first. Nx

(x) *Issued under authority of Commission Order 11-111 to be in compliance with the Sprint v Northern Valley Order.*

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits x

3.1.5.1 To safeguard its interests, the Company may require a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit will be required under the following conditions:

(a) Buyer has had no previous Access Service; or

(b) Buyer does not have verifiable credit the Company; or

(c) Buyer has had previous verifiable Access Service with the Company but has an outstanding and unpaid bill for Access Service; or has not established satisfactory credit. Satisfactory credit for an Access Service Buyer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment.

The deposit will not exceed an amount equal to:

(a) two months' charges for a Service or facility which has a minimum payment period of one month; or

(b) the charges that would apply for the minimum payment period for a Service or facility which has a minimum payment period of more than one month; except that the deposit may include an additional amount in the event that a termination charge is applicable. x

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits (Cont'd)

3.1.5.2 An initial deposit or an additional deposit will be required of an existing Buyer when high risk is indicated and existing security is insufficient. Such requirement will be imposed when payment history includes a suspension of service for nonpayment, or includes more than one notification of intention to suspend service for nonpayment during the previous twelve month period. x

(a) Any demand for a deposit from an existing Buyer is due and payable within ten days after the requirement is imposed. This demand shall be in writing. If said deposit or installment thereof, as appropriate, is not paid within the aforementioned time frame, the Company may suspend service of the Buyer without further notice.

(b) When it is determined that a deposit is required under the conditions specified above, the Buyer may, in lieu of or in addition to making the deposit, arrange for an acceptable third party to guarantee payment of his charges by executing on his behalf a Guarantee of Payment Agreement with the Company. An acceptable third party guarantor for Access Service is a current Buyer with at least two years' continuous service, whose payment history for the most recent twelve month period is satisfactory.

3.1.5.3 When a Service is discontinued, the amount of a deposit, if any, will be applied to the Buyer's account and any credit balance remaining will be refunded.

3.1.5.4 Simple Interest shall accrue on a deposit and shall be paid at the time the deposit is either refunded or applied to the Buyer's final bill for service. Simple Interest will be applied for the month or portion of a month from the date the Buyer deposit is received by the Company to and including the date such deposit is credited to the Buyer's account or the date the deposit is refunded by the Company.

3.1.5.5 Such a deposit will be refunded or credited to the Buyer's account after a one-year, prompt-payment record is established. x

Certain material on this page was previously on Page 30.
(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

James Groft
2211 Eighth Avenue NE, Suite 1101
Aberdeen, SD 57401

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.6 Discontinuance of Service (Cont'd)

3.1.6.4 Upon any governmental prohibition or required alteration of the Service(s) to be provided or any violation of any applicable law or regulation, the Company may immediately discontinue Service without incurring any liability.

3.1.6.5 Upon the Company's discontinuance of Service to the Buyer under the terms of this Tariff, the Company, in addition to all other remedies that may be available to the Company at law or in equity or under any other provision of this tariff, may declare all future monthly and other charges which would have been payable by the Buyer during the remainder of the term for which such Service(s) would have otherwise been provided to the Buyer to be immediately due and payable.

3.1.7 Billing Disputes

3.1.7.1 General

(a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company. For the purposes of this Section, "notice of a good faith dispute" is defined as written notice to the Company's contact (which is listed on every page of this Tariff) within a reasonable period of time after the invoice has been issued, containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute. x

(b) Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network. x

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.1 General (Cont'd)

x

(c) If payment of the originally billed amount is not made when due – whether or not a notice of dispute has been submitted – Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5% per month on the total unpaid balance.

(d) The Company will evaluate the Buyer's dispute and notify the Buyer in writing of its determination of whether the dispute has been resolved in favor of or against the Buyer. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination. x

3.1.7.2 Late Payment Fee

All portions of the bill, whether disputed or undisputed, must be paid by the payment due date to avoid assessment of a Late Payment Fee.

3.1.7.3 Adjustments or Refunds to the Buyer

(a) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, the Company will credit the Buyer's account for any overpayment by the Buyer, together with Simple Interest, in the billing period following the resolution of the dispute.

(b) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, but canceled the service, the Company will issue a refund of any overpayment by the Buyer, together with Simple Interest.

(x) ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

James Groft
2211 Eighth Avenue NE, Suite 1101
Aberdeen, SD 57401

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.3 Adjustments or Refunds to the Buyer (Cont'd)

(c) All adjustments or refunds provided by the Company to the Buyer at the Buyer's request, or provided by the Company to the Buyer by way of compromise of a billing dispute, and which are accepted by the Buyer, are final and constitute full satisfaction, settlement, and/or compromise of all of the Buyer's claims for the billing period for which the adjustment or refund was issued.

3.1.7.4 Attorneys' Fees

X

In the event that the Company pursues and prevails on a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, including refusal to pay for services originating or terminating to a Volume End User, Buyer shall be liable for the payment of the Company's reasonable attorneys' fees expended in collecting those unpaid amounts. X

3.2 Access Billing

3.2.1 Billing Standards

3.2.1.1 The Company shall produce access bills in general conformance with accepted industry standards.

3.2.1.2 An access bill is comprised of one or more billing elements, including usage sensitive charges, distance sensitive charges, flat-rated charges, individual-case-based (ICB) charges, and Nonrecurring or special miscellaneous charges that may be appropriate.

Some material previously found on this page has been moved to page 34.1.

[x] ***Issued under authority of Commission Order 11-111 to bring tariff material into compliance with the Sprint v Northern Valley Order.***

EXHIBIT H

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Northern Valley Communications, LLC.	)	FCC Tariff No. 3
	)	Transmittal No. 8

To: Pricing Policy Division
Wireline Competition Bureau

PETITION TO REJECT, OR IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE

I. INTRODUCTION AND SUMMARY

As an interexchange carrier ("IXC") that may be charged pursuant to the above-captioned Northern Valley Communications, LLC ("Northern Valley") revised tariff ("Second Revised 2011 Tariff"),[1] Qwest Communications Company, LLC ("Qwest")[2] submits this petition to reject, or, in the alternative, suspend and investigate, the Second Revised 2011 Tariff under Section 204(a) of the Communications Act of 1934 (the "Act")[3] and Section 1.773(a)(1)(ii) of the Federal Communications Commission's ("Commission's") rules.[4] The Second Revised 2011 Tariff should be rejected for the same reasons that prompted the Commission to hold in the

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[1] Northern Valley Communications, LLC, Access Service Tariff F.C.C. No. 3 (filed July 26, 2011, to be effective Aug. 10, 2011) ("Second Revised 2011 Tariff").

[2] As of April 1, 2011, Qwest Communications Company, LLC became a wholly owned, indirect subsidiary of CenturyLink, Inc.

[3] 47 U.S.C. § 204(a).

[4] 47 C.F.R. § 1.773(a)(1)(ii).

Sprint v. Northern Valley Order that a previous tariff filed by Northern Valley ("2010 Tariff")[5] "contain[ed] ... unreasonable payment and billing provisions."[6]

The Second Revised 2011 Tariff revises the billing dispute resolution provisions in Northern Valley Tariff F.C.C. No. 3, apparently in response to the *Sprint v. Northern Valley Order*. Unfortunately, the revised provisions still require an IXC to pay virtually any charge, no matter how unreasonable, in order to dispute the charge, and they conflict with Sections 206 to 208 of the Act.[7] Therefore, Northern Valley has not cured the legal deficiencies in the Tariff declared unlawful in the *Sprint v. Northern Valley Order*. The Wireline Competition Bureau ("Bureau") should therefore reject the Second Revised 2011 Tariff as "patently unlawful," or at least suspend and investigate it.

II. BACKGROUND

A. The Northern Valley Decisions

In the *Sprint v. Northern Valley Order*, the Commission struck down Northern Valley's 2010 Tariff because, *inter alia*, it imposed unreasonable billing dispute terms. Section 3.1.7.1(b) of the 2010 Tariff required all disputed charges to be paid in full in order for a party to whom such charges were assessed to "submit[] a good faith dispute."[8] The Commission held Section 3.1.7.1(b) unreasonable because

> this provision requires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances

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5 Northern Valley Communications, LLC Access Service Tariff F.C.C. No. 3 (filed July 8, 2010; eff. July 23, 2010) ("2010 Tariff").

6 *Sprint Communications Co. L.P. v. Northern Valley Communications, LLC,* FCC 11-111 at ¶ 1 (rel. July 18, 2011) ("*Sprint v. Northern Valley Order*").

7 47 U.S.C. §§ 206-08.

8 2010 Tariff § 3.1.7.1(b).

> (including, for example, if no services were provided at all), in order to dispute a charge.[9]

Section 3.1.7.1(d) also provided that Northern Valley is "the sole judge of whether any bill dispute has merit."[10] The Commission held that provision unreasonable too, because

> it conflicts with sections 206 to 208 of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier's alleged violation of the Act.[11]

The Commission directed Northern Valley to file tariff revisions within ten days consistent with the *Sprint v. Northern Valley Order*.[12]

B. Northern Valley's Second Revised 2011 Tariff

On July 26, 2011, following the *Sprint v. Northern Valley Order*, Northern Valley submitted the Second Revised 2011 Tariff, presenting purportedly responsive billing dispute provisions. Section 3.1.7.1(b) now states:

> Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for ... any disputed charges relating to traffic

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[9] *Sprint v. Northern Valley Order* at ¶ 14.

[10] 2010 Tariff § 3.1.7.1(d).

[11] *Sprint v. Northern Valley Order* at ¶ 14.

[12] *Id.* at ¶ 24. The Commission previously found the 2010 Tariff unlawful on other grounds in *Qwest Communications Co., LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332 (2011) ("*Qwest v. Northern Valley Order*"), *pets. for recon. pending*, which required Northern Valley to file a revised tariff to cure the violations. Northern Valley filed a revised tariff on June 14, 2011. *See* Northern Valley Communications, LLC Access Service Tariff F.C.C. No. 3 (filed June 14, 2011; eff. June 29, 2011) ("2011 Tariff"). The Bureau rejected the 2011 Tariff in *Northern Valley Communications, LLC Revisions to Tariff No. 3*, DA 11-1132 (WCB/PPD rel. June 28, 2011). Northern Valley again filed revisions to its tariff on July 7, 2011. *See* Northern Valley Communications, LLC Access Service Tariff F.C.C. No. 3 (filed July 7, 2011; eff. July 22, 2011) ("Revised 2011 Tariff"). The Revised 2011 Tariff went into effect on July 22, 2011. *See Protested Tariff Transmittal Action Taken*, Public Notice, DA 11-1257 (WCB/PPD rel. July 28, 2011). Because the Revised 2011 Tariff is the most recent Northern Valley tariff filing that contains the entire tariff, this petition cites to that version where necessary.

> in which the Buyer transmitted an interstate telecommunications [sic] to [Northern Valley's] network.[13]

Section 3.1.7.1(d) now states:

> [Northern Valley] will evaluate the Buyer's dispute and notify the Buyer ... of its determination .... If [Northern Valley] does not respond to the Buyer's notice of dispute within 60 days ... the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with [Northern Valley's] determination.[14]

These revisions do not clearly cure the deficiencies identified in the *Sprint v. Northern Valley Order*.

III. THE SECOND REVISED 2011 TARIFF FILING SHOULD BE REJECTED AS PATENTLY UNLAWFUL

A. The Revised Billing Dispute Provision Still Requires Disputed Charges to be Paid in Virtually All Circumstances

The *Sprint v. Northern Valley Order* held the prior version of Section 3.1.7.1(b) unreasonable because it required "everyone to whom Northern Valley sends an access bill" to pay it, "no matter what the circumstances," in order to dispute the charges.[15] Northern Valley apparently is under the misimpression that it has appropriately limited the scope of the revised provision, in light of the *Sprint v. Northern Valley Order*, by restricting it to "disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to [Northern Valley's] network."[16] This restriction, however, is no limitation at all. "Buyer" is defined in the Revised 2011 Tariff as "an Interexchange Carrier utilizing [Northern Valley's] Access Service to complete a Call to or from End Users," and a "Buyer is responsible for the payment of charges

[13] Second Revised 2011 Tariff § 3.1.7.1(b).

[14] *Id.* § 3.1.7.1(d).

[15] *Sprint v. Northern Valley Order* at ¶ 14.

[16] Second Revised 2011 Tariff § 3.1.7.1(b).

for any service it takes from [Northern Valley]."[17] Thus, any entity receiving an access bill from Northern Valley inevitably will be an IXC, such as Qwest, sending interstate interexchange traffic to Northern Valley. Accordingly, "*everyone* to whom Northern Valley sends an access bill"[18] also falls within the supposedly limited category of "Buyer" that "transmitted an interstate telecommunications to [Northern Valley's] network."[19] Thus, the revised version of Section 3.1.7.1(b) still "requires everyone to whom Northern Valley sends an access bill to pay that bill ... in order to dispute a charge."[20] The Revised 2011 Tariff thus merely replicates the problem previously identified.

This analysis is not affected by the parenthetical phrase in the Commission's observation that a disputed access bill would have to be paid, "no matter what the circumstances (including, for example, if no services were provided at all), in order to dispute a charge."[21] That phrase cannot be read to suggest that a situation in which "no services were provided" is the *only* circumstance in which a payment requirement would be held an unreasonable condition for disputing a charge. The Commission clearly intended the parenthetical phrase as an "*example*" of a situation "includ[ed]" in the set of circumstances in which a payment requirement would be held unreasonable.[22] There are obviously many other circumstances in which a payment requirement would be an unreasonable condition for disputing a charge, such as an overcharge

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[17] Revised 2011 Tariff at 3rd Revised Page No. 7.

[18] *Sprint v. Northern Valley Order* at ¶ 14 (emphasis added).

[19] Second Revised 2011 Tariff § 3.1.7.1(b).

[20] *Sprint v. Northern Valley Order* at ¶ 14.

[21] *Id.*

[22] *Id.* (emphasis added).

much higher than the tariffed rate or a charge not matching the service or for a much greater volume of service than was provided.

Moreover, the fact that "the Buyer transmitted an interstate telecommunication[] to [Northern Valley's] network"[23] hardly guarantees that "services were provided."[24] As the *Qwest v. Northern Valley Order* and other cases demonstrate, tariffed competitive local exchange carrier ("CLEC") end office access charges are unreasonable for the processing of "an interstate telecommunications [transmitted] to" Northern Valley's network if the "telecommunication[]" is received by a non-end user.[25] That is true if a CLEC tariff permits such end office charges for the processing of traffic to non-end users,[26] and it is true in the case of any LEC that assesses end office access charges for the processing of traffic to non-end users in violation of its tariff.[27] Thus, it would be unreasonable to require that a disputed access charge be paid with regard to interstate traffic transmitted to Northern Valley for delivery to a non-end user.[28] Because the revised version of Section 3.1.7.1(b) of the Second Revised 2011 Tariff imposes a disputed charge payment requirement in virtually any circumstances, including a charge for the

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[23] Second Revised 2011 Tariff § 3.1.7.1(b).

[24] *Sprint v. Northern Valley Order* at ¶ 14.

[25] *Qwest v. Northern Valley Order* at ¶¶ 6, 8, 11.

[26] *Id.* at ¶¶ 11, 13, 15.

[27] *Id.* at ¶ 4 n.14 (citing *Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, 24 FCC Rcd 14801, 14806 ¶¶ 1, 12 (2009), *recon. denied*, 25 FCC Rcd 3422 (2010), *pet. for rev. pending sub nom. Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa v. FCC*, filed May 7, 2010 (D.C. Cir. No. 10-1093)).

[28] *See, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000) (CLECs are not entitled to collect tariffed charges until they "demonstrate (1) that they operated under a federally filed tariff and (2) that they provided services to the customer pursuant to that tariff."); *Iowa Network Servs., Inc. v. Qwest Corp*, 385 F. Supp. 2d 850 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006) (rejecting the argument that impermissible "self-help" occurred when the services provided were not within the scope of the tariff).

processing of traffic terminated to a non-end user, it is unreasonable, in violation of Section 201(b) of the Act.

B. The Revised Billing Dispute Provision Infringes Customers' Remedial Rights

Northern Valley also has inadequately responded to the *Sprint v. Northern Valley Order* in its revision of Section 3.1.7.1(d) of the Second Revised 2011 Tariff. The Commission held the previous version of that provision to be unreasonable because it conflicted with a customer's statutory right to file a complaint regarding a carrier's alleged violation of the Act.[29] The revised version of Section 3.1.7.1 still requires a customer to submit any disputed charge to the tariffed dispute resolution process. Any bill not submitted pursuant to that process is "binding on the Buyer."[30] Section 3.1.7.1(d) provides that, at the end of that process, "Buyer has the right to pursue any and all legal remedies if dissatisfied with [Northern Valley's] determination."[31]

This provision could be read to require a Buyer to go through the tariffed dispute resolution process as a prerequisite to the exercise of its statutory remedies under Section 206-08 of the Act. Particularly where Northern Valley has assessed end office access charges as to traffic terminated to non-end users, a requirement that a Buyer pay the disputed charge and submit to the dispute resolution process as a prerequisite to exercising its statutory remedial rights infringes those rights and is therefore unreasonable under Section 201(b) of the Act. At best, it is not clear under this provision whether a customer in fact is required to undertake the

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[29] *Sprint v. Northern Valley Order* at ¶ 14.

[30] Second Revised 2011 Tariff § 3.1.7.1(a).

[31] *Id.* § 3.1.7.1(d).

tariffed dispute resolution process as a prerequisite to exercising its statutory remedial rights, and the provision thus is fatally ambiguous under the Commission's rules.[32]

Accordingly, the Second Revised 2011 Tariff should be rejected, and the Bureau should order Northern Valley to replace it with new billing dispute provisions that clearly respond to the *Sprint v. Northern Valley Order*.

IV. IF THE COMMISSION DOES NOT REJECT THE SECOND REVISED 2011 TARIFF, IT SHOULD SUSPEND AND INVESTIGATE THE TARIFF

The Second Revised 2011 Tariff warrants rejection. If the Commission does not reject it, however, the Second Revised 2011 Tariff satisfies the requirements for suspension of non-dominant carrier tariffs set forth in the Commission's rules:[33]

- There is a high probability that the Second Revised 2011 Tariff will be found to be unlawful after investigation, based on the legal infirmities discussed above.
- The harm to competition and the public interest caused by the Second Revised 2011 Tariff filing would be more substantial than the injury to the public arising from the suspension of the revised billing dispute provisions. As detailed above, the Second Revised 2011 Tariff would enable Northern Valley to continue requiring all charges to be paid as a condition of disputing such charges and infringing on customers' rights under Sections 206-08 of the Act. It could also require IXCs to pursue the prescribed dispute resolution process before exercising their statutory remedial rights.
- Irreparable injury will result if the Second Revised 2011 Tariff is not suspended. Because the Second Revised 2011 Tariff was filed on fifteen days' notice under Section

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[32] The Commission's rules specify that all tariff language must be clear and unambiguous:

> In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

47 C.F.R. § 61.2(a). *See also Capital Network Systems, Inc.*, Tariff FCC No. 2, Memorandum Opinion and Order, 7 FCC Rcd 8092, 8093-94 ¶¶ 10-11 (1992), *pet. for rev. denied*, *Capital Network Systems v. FCC*, 28 F.3d 201 (D.C. Cir. 1994); *Ameritech Operating Companies Tariff FCC No. 2*, Memorandum Opinion and Order, 1987 FCC LEXIS 4184 ¶ 26, 62 Rad. Reg. 2d (P&F) 1047 (FCC 1987).

[33] 47 C.F.R. § 1.773(a)(1)(ii).

204(a)(3) of the Act, unless it is rejected or suspended, Northern Valley would likely claim that carriers injured by the billing dispute provisions have no recourse for injury caused while the Second Revised 2011 Tariff was in effect. Moreover, to the extent that Northern Valley continues to share access revenue with its business partners, such revenues would be unavailable to a successful complainant in subsequent litigation.

- The suspension is otherwise consistent with the public interest. There are no public purposes that the Second Revised 2011 Tariff furthers, and the billing dispute provisions are contrary to the public interest.

Especially because the Second Revised 2011 Tariff has been filed on 15 days notice and purports to partake of "deemed lawful" status conferred by Section 204(a)(3) of the Act, if it is not rejected outright, it should not be allowed to take effect except subject to suspension and a full investigation of its lawfulness.

V. CONCLUSION

The revisions in the Second Revised 2011 Tariff do not clearly cure the legal deficiencies set forth in the *Sprint v. Northern Valley Order*. The Bureau should reject the Second Revised 2011 Tariff as patently unlawful. Alternatively, the Bureau should suspend and investigate the

Second Revised 2011 Tariff in order to avoid the harm to the public interest of allowing it to be granted "deemed lawful" status.

Respectfully submitted,

QWEST COMMUNICATIONS
COMPANY, LLC

By: ______________________

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August 2, 2011

CERTIFICATE OF SERVICE

I, Marc Knox, do hereby certify that I have caused the foregoing **PETITION TO REJECT, OR IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE** to be served via courier (at the addresses indicated below) and e-mail on each of the following: (1) Chief of the FCC's Wireline Competition Bureau; (2) Chief of the Pricing Policy Division of the Wireline Competition Bureau; (3) FCC's copy contractor; and (4) counsel for the tariff filing carrier, Northern Valley Communications, LLC.

Sharon Gillett
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Marc Knox

August 2, 2011

EXHIBIT I

Sprint

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Facsimile

To:	G. David Carter Arent Fox LLP	**Pages:**	7 (including cover)
Fax:	202-857-6395	**Date:**	August 2, 2011
Phone:		**cc:**	
Re:	**Northern Valley Communications, LLC Tariff FCC No. 3, Transmittal No. 8**		

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recylcle

Attached is a copy of Petition of Sprint Communications Company, L.P. to Reject, Or, In the Alternative, to Suspend and Investigate filed today with the Office of the Secretary of the FCC in the above referenced matter.

Please contact Marybeth Banks (703-592-5111) or Mike Fingerhut (703-592-5112) with any questions.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Northern Valley Communications, LLC Tariff F.C.C. No. 3	)	**Transmittal No. 8**
	)	

PETITION OF SPRINT COMMUNICATIONS COMPANY, L.P.
TO REJECT, OR, IN THE ALTERNATIVE, TO SUSPEND AND INVESTIGATE

Pursuant to Sections 201 and 204(a) of the Communications Act, as amended, 47 U.S.C. §§ 201, 204, and Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, Sprint Communications Company, L.P. ("Sprint") hereby respectfully requests that the Commission reject, or in the alternative suspend and investigate, Transmittal No. 8, Tariff F.C.C. No. 3 ("Tariff F.C.C. No. 3) filed by Northern Valley Communications, LLC.[1] The revisions were filed allegedly to comply with the Commission's decision in *Sprint Communications Company L.P. v. Northern Valley Communications, LLC*, FCC File No. EB 11-MD-003, FCC 11-111, rel. Jul. 18, 2011 ("*Sprint Decision*") which agreed with Sprint that the previous version of these provisions where unreasonable under Section 201(b) of the Act. As set forth below, Northern Valley's revised version of these provisions are no better than the ones that the Commission found to be unlawful. Indeed, Northern Valley has simply failed to address the Commission's concerns that informed the Commission's decision on Sprint complaint.

[1] Northern Valley Communications, LLC, Transmittal No. 8, Tariff FCC No. 3 (issued Jul. 26, 2011, on fifteen (15) days' notice) ("Tariff FCC No. 3").

For example, in the *Sprint Decision*, the Commission found that Northern Valley's tariff language that permitted it to disregard the PIU Factor supplied by the interexchange carrier "may result in a PIU Factor that bears no relationship to the actual percentage of the Buyer's interstate and intrastate traffic."[2] In response to this finding, Northern Valley has modified the language in Section 3.1.4.3, ("Jurisdictional Reporting Requirements") to state that when the Buyer does not supply a projected PIU factor," Northern Valley will use a a PIU of 50% interstate and 50% intrastate [3] Use of such a PIU factor continues to be at odds with reality. This is so because Northern Valley's switch is located in Aberdeen, SD through which it handles conference call and other traffic generated by its "free service provider" partners. Plainly, unlike most other local exchange carriers for which a 50-50 split would be reasonable, most, if not all, of Northern Valley's traffic is interstate. Thus, if a carrier is unable to provide Northern Valley with a PIU, Northern Valley would be able to use its unrealistic PIU factor to impose its intrastate access charges, which are significantly higher than the interstate access charges set forth in Northern Valley interstate tariff..

In the *Sprint Decision*, the Commission also made clear that allowing a carrier to have an unconstrained ability to impose deposit obligations is unreasonable under section 201(b) of the Act because that could lead to potentially discriminatory application.[4] In its proposed changes to Section 3.1.5.1 (c), Northern Valley seeks to require the Buyer to make a deposit if the Buyer

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[2] *Sprint Decision* at ¶ 12.

[3] Tariff F.C.C. No. 3, Original Page No. 29.1.

[4] *See id.* at ¶ 13.

"has not established satisfactory credit." [5] Northern Valley defines "satisfactory credit" as follows: "Satisfactory credit for an Access Service Buyer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment."[6] Thus, under this proposed definition, Northern Valley has the ability to require a deposit if it sends a notice of intent for any reason to suspend service for nonpayment. Northern Valley provides no qualifications as to how large or small the nonpayment would be to qualify for a deposit, and it makes no exception for a carrier that disputes a bill. Thus, the proposed changes are similar to the prior provisions that the Commission found to be unreasonable because they "establish no standard as to when a deposit will be required .. [and] [s]uch unconstrained ability to impose deposit obligations is susceptible to potentially discriminatory application."[7]

The Commission also found Northern Valley's "Billing Disputes provision unreasonable because it required customers to pay disputed amounts in full "prior to or at the time of submitting a good faith dispute."[8] Northern Valley's proposed language is similarly unreasonable: "Prior to or at the time of submitting a good faith dispute, Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network."[9] Thus, it is clear that the customers would still have to pay the entire bill. Stated differently, payment will continue to be required in order to dispute a bill or any portion of the

[5] Tariff F.C.C. No. 3, First Revised Page No. 30.

[6] *Id.* Similar language is found in Section 3.1.5.2.

[7] *Sprint Decision.* at ¶ 13

[8] *Id.* at ¶ 14.

[9] Tariff FCC No. 3, First Revised Page No. 32.

bill. And to make matters worse, the bill need not be for any services that Northern Valley provides – let alone any services provided pursuant to its tariff. To the contrary, the bill must simply "relate" to traffic that the Buyer transmits to Northern Valley. Northern Valley could send a bill for $100 billion dollars and demand that Sprint pay that bill in order to properly dispute a charge. This scenario, while outlandish, is still plausible because the proposed revisions to Section 3.1.7.1(a) still state that a bill sent by Northern Valley is binding on a Buyer unless notice of a good faith dispute is received by Northern Valley.[10] If a bill is binding on a Buyer until that good faith dispute notice is *received* by Northern Valley, yet a Buyer must remit payment for disputed charges that "relate" to traffic that the Buyer transmits *prior to or at the time of submitting* a good faith dispute, Northern Valley could arguably require the purported Buyer to pay that outlandish bill to preserve the dispute. Because the proposed revisions to Section 3.1.7.1(b) are still in violation of the *Sprint Decision*, they must be rejected.

If, contrary to Sprint's position, the Commission declines to reject the revisions, it nonetheless should suspend and investigate the tariff because the proposed language meets the requirements for suspension under Section 1.773(a)(ii) of the Commission's rules.[11] First, there is a very high probability that the identified revisions would be found to be unlawful after an investigation, due to the issues referenced above. Second, the harm to competition caused by the filing greatly outweighs the injury to the public arising from the unavailability of the service provided by the tariff. As detailed above, the filing is yet another attempt to legitimize Northern Valley's activities so that it can bill Sprint and other interexchange carriers an unreasonably high rate for traffic delivered to Northern Valley's business partners. If the Commission suspends this

[10] *Id.* ("All bills are presumed accurate, and shall be binding on the Buyer unless written notice of a good faith dispute is received by the Company.")
[11] 47 C.F.R. § 1.773(a)(ii).

tariff, there will be no injury to the public, and, on the contrary, multiple state regulators, including the Iowa Utilities Board and the Utah Public Service Commission, have found that traffic pumping is not in the public interest.[12]

For the foregoing reasons, the Commission must reject Transmittal No. 8, Tariff No. 3, or, in the alternative, suspend and investigate the tariff.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY. L.P.

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August 2, 2011

[12] *See Qwest v. Superior Telephone Cooperative, et al.,* Order Denying Requests for Reconsideration, Iowa Utilities Board, Docket No. FCU-07-2, issued February 4, 2011 and *In the Matter of the Consideration of the Rescission, Alteration or Amendment of the Certificate of authority of All American to Operate as a Competitive Local Carrier within the State of Utah,* Report and Order, Utah Public Service Commission (Docket No. -8-2469-01) issued April 26, 2010.

CERTIFICATE OF SERVICE

I, Jo-Ann Monroe, do hereby certify that on this 2nd day of August, 2011, I have caused the foregoing "PETITION OF SPRINT COMMUNICATIONS COMPANY, L.P. TO REJECT, OR, IN THE ALTERNATIVE, TO SUSPEND AND INVESTIGATE" to be filed with the Office of the Secretary of the FCC, with a copy served via hand delivery, electronic mail, and/or facsimile, to the parties listed below:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
(Via Hand Delivery)

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Jo-Ann Monroe
Jo-Ann Monroe

EXHIBIT J

Arent Fox LLP / **Washington, DC** / New York, NY / Los Angeles, CA

Arent Fox

August 5, 2011

G. David Carter
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VIA HAND DELIVERY
Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Northern Valley Communications, LLC Response to   west Communications Company, LLC and Sprint Communications Company, LP Petitions to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 8

Dear Ms. Dortch:

On behalf of Northern Valley Communications, LLC, enclosed please find an original and four (4) copies of the Response to   west Communications Company, LLC and Sprint Communications Company, LP's Petitions to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 8.

 uestions relating to this filing should be directed to:

G. David Carter
Arent Fo , LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 857-8972
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Please date stamp the duplicate of this filing and return to the undersigned in the enclosed envelope.

Respectfully submitted,

G. David Carter

G. David Carter

cc: Service List

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	FCC Tariff No. 3
Northern Valley Communications, LLC	Transmittal No. 8

NORTHERN VALLEY COMMUNICATIONS, LLC RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S AND SPRINT COMMUNICATIONS COMPANY, LP'S PETITIONS TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE

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Counsel for Northern Valley Communications, LLC

August 5, 2011

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Federal Communications Commission
Washington, D.C. 20554

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NORTHERN VALLEY COMMUNICATIONS, LLC RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S AND SPRINT COMMUNICATIONS COMPANY, LP'S PETITIONS TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE

I. INTRODUCTION AND SUMMARY

Northern Valley Communications, LLC ("Northern Valley"), through counsel and pursuant to 47 C.F.R. § 1.773(b)(1)(iii), hereby responds to the Petitions to Reject or, in the Alternative, Suspend and Investigate filed by Qwest Communications Company, LLC ("Qwest") and Sprint Communications Company, LP ("Sprint") on August 2, 2011 ("Petitions"). Qwest and Sprint have no credible basis to request the rejection or suspension of the Northern Valley FCC Tariff No. 3, Transmittal No. 8 filed July 26, 2011 ("Transmittal No. 8"). Northern Valley has appropriately revised its Tariff to reflect the Commission's order in *Sprint Communications Company, LP v. Northern Valley Communications, LLC*, File No. EB-11-MD-003, 2011 WL 2838100 (July 18, 2011) ("*Sprint v. Northern Valley Order*"). The revisions to the tariff respond fully to the *Sprint v. Northern Valley Order*. Qwest and Sprint's arguments thus amount to an effort to require more of Northern Valley than that which was required by the Commission's order. These efforts should be rejected and the Petitions denied in their entirety.

II. BACKGROUND

Northern Valley is a rural competitive local exchange carrier ("CLEC") that was founded in 1997 and holds a Certificate of Authority from the South Dakota Public Utilities Commission. Northern Valley serves business and residential customers in Aberdeen and Redfield, South Dakota. It provides calling services and high-speed data and broadband Internet access services, including LAN and WAN networks and ISDN service. Northern Valley also provides high-definition television service and digital cable television service.

Northern Valley and Qwest have been engaged in protracted litigation since July 2008 when Northern Valley initiated a collection action in order to collect for unpaid switched access provided to Qwest pursuant to Northern Valley's F.C.C. Tariff No. 2. *See Northern Valley Communications, LLC v. Qwest Communications Corp.*, Civ. 09-1004-CBK (D.S.D). At the heart of that litigation is whether Northern Valley's F.C.C. No. 2 applies to traffic Qwest's long distance customers' originate and that terminate to conference calling service providers that are Northern Valley's Customers. That case is now stayed and several issues have been referred to the Commission for resolution. *See id., Opinion and Order*, 2010 WL 3909932, Dkt. 159 (Sept. 10, 2010).

Similarly, Northern Valley and Sprint have been engaged in protracted litigation since July 2008 when Northern Valley initiated a collection action for unpaid switched access provided to Sprint pursuant to Northern Valley's F.C.C. Tariff No. 2. *See Northern Valley Communications, LLC v. Sprint Communications Co., LP*, Civ. 08-1003 (D.S.D). That case is also now stayed and several issues have been referred to the Commission for resolution. *See id.*, Order (Dkt. 112) (D.S.D. May 12, 2010).

After the FCC issued its Second Order on Reconsideration in *Farmers and Merchants*,[1] Northern Valley recognized that the Commission had created unnecessary doubt about whether its Tariff No. 2 would be found to apply to portions of the traffic that Qwest and other IXCs were sending to Northern Valley. Accordingly, Northern Valley prepared and, on July 8, 2010, filed a new tariff, F.C.C. Tariff No. 3. In addition, Northern Valley responded to what is perceived to be primarily a concern about the rates assessed on calls terminating to conferencing service providers by adopting a composite rate of $0.014/mou for traffic terminating to these "Volume End Users" (as defined by the Tariff).[2]

Qwest filed a Formal Complaint challenging the lawfulness of Northern Valley's FCC Tariff No. 3 on January 6, 2011. The Commission resolved that Formal Complaint on June 7, 2011, in the *Qwest v. Northern Valley Order*. Sprint filed a Formal Complaint regarding Tariff No. 3. *See In re Sprint Communications Co. LP v. Northern Valley Communications, LLC*, EB-11-MD-003 (filed Feb. 17, 2011). The *Sprint v. Northern Valley Order* was released on July 18, 2011.

After the Commission released the *Qwest v. Northern Valley Order*, Northern Valley submitted under protest tariff modifications intended to comply with the order's requirement that switched access charges only be assessed on calls terminating to an end user that pays Northern

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1 *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (2007) ("*Farmers I*"); Order on Reconsideration, 23 FCC Rcd. 1615 (2008) ("*Farmers II*"); Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009) ("*Farmers III*").

2 Qwest moved to late file a petition to suspend or reject Tariff No. 3, together with the petition to suspend or reject, on July 22, 2010. On that same day, Sprint filed self-styled "Comments" on the tariff, wherein it urged the Commission to grant Qwest's untimely petition. The Division effectively rejected Qwest and Sprint's attempts to invalidate the Tariff by taking no action on the petition to reject or suspend and investigate the Tariff. The Tariff became effective and was "deemed lawful" by operation of law on July 23, 2010.

Valley a fee for service. Northern Valley F.C.C. Tariff No. 3, Transmittal No. 5 (filed June 14, 2011). Following the receipt of petitions to reject or suspend the tariff filed by Qwest and Sprint, the Wireline Competition Bureau rejected Transmittal No. 5. *In the Matter of Northern Valley Communications, LLC Revisions to FCC Tariff No. 3*, WCB/Pricing File No. 11-07, Transmittal No. 5 (June 28, 2011) ("Northern Valley Tariff Order"). As directed by the *Northern Valley Tariff Order*, Northern Valley filed, on one days' notice, a modification to return the tariff to its original condition. Northern Valley F.C.C. Tariff No. 3, Transmittal No. 6 (filed July 5, 2011). Finally, Northern Valley filed further revisions, on fifteen days' notice, to again attempt to effectuate the ordering clause of the *Qwest v. Northern Valley Order*. *See* Transmittal No. 7. Those changes were allowed to go into effect and receive deemed lawful status over the protests of Qwest and Sprint.

Finally, on July 26, 2011, Northern Valley filed under protest and on fifteen days' notice changes to effectuate modifications mandated by the *Sprint v. Northern Valley Order*. Qwest and Sprint filed their petitions to suspend or reject on August 2, 2011.

III. STANDARD

The standard that must be met for suspending a nondominant carrier's tariff is set forth in the Commission's rules:

> (ii) For purposes of this section, tariff filings by nondominant carriers will be considered prima facie lawful, and will not be suspended by the Commission unless the petition requesting suspension shows:
>
> (A) That there is a high probability the tariff would be found unlawful after investigation;
>
> (B) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;

> (C) That irreparable injury will result if the tariff filing is not suspended; and
>
> (D) That the suspension would not otherwise be contrary to the public interest.

47 C.F.R. § 1.773(a)(1)(ii).

IV. DISCUSSION

A. TRANSMITTAL NO. 8 FULLY RESPONDS TO THE *SPRINT V. NORTHERN VALLEY ORDER* AND THERE IS NO BASIS TO REJECT IT

As discussed below, Northern Valley has responded fully to the issues identified in the *Sprint v. Northern Valley Order*. In nearly every situation, the modifications contained in Transmittal No. 8 reflect the exact language utilized by Qwest Communications Company, LLC in its tariff, and thus there is no reason to reject or suspend Northern Valley's tariff. Qwest and Sprints' protestations to the contrary are without merit. The Commission should deny the petitions and allow Transmittal No. 8 to go into effect and receive deemed law protection.

1. THE REVISED JURISDICTIONAL REPORTING REQUIREMENTS ARE LAWFUL

The *Sprint v. Northern Valley Order* concluded that the jurisdictional reporting requirements in Tariff No. 3 were unreasonably vague because "Northern Valley is not obligated to use the PIU Factor supplied by the IXC." *Sprint v. Northern Valley Order* at 12. The Commission concluded that the language was unlawful because it gave "Northern Valley unfettered discretion to use a different PIU Factor and, therefore, the ability to rely on unspecified and potentially arbitrary and discriminatory factors to establish the jurisdiction of the traffic." *Id.*

In response, Northern Valley modified its tariff to include a very detailed process governing the manner in which jurisdictional reporting would occur and how Northern Valley would apply factors to unjurisdictionalized traffic. Indeed, the language utilized by Northern

Valley is derived nearly entirely from the jurisdictional reporting requirements set forth in the tariff of Qwest Communications Company, LLC. *See* Qwest Communications Company, LLC, FCC Tariff No. 1, § 2.3.9.[3] Specifically, Transmittal No. 8 ***requires*** carriers to provide a PIU factor. Transmittal No. 8, § 3.1.4.2. It requires the Buyer to update this factor on a quarterly basis, based on an analysis of current data. *Id.* at 3.1.4.4. And, if Northern Valley has concern about the validity of the supplied PIU factor, it permits Northern Valley to deviate from the factor supplied by the IXC **only** if Northern Valley first has an independent audit conducted. *Id.* at 3.1.4.5 - 3.1.4.6. Thus, the provisions included in Transmittal No. 8 eliminate the discretion that the Commission found to be problematic in the original Tariff No. 3 and fully satisfies the requirements of the *Sprint v. Northern Valley Order*.

Despite this very detailed and clear process, Sprint argues that it is nevertheless unlawful. Specifically, it argues that because Transmittal No. 8 provides that, in the unlikely situation that an IXC fails to full its duty to provide a PIU factor, Northern Valley will apply a default PIU of 50%, meaning 50% of the traffic would treated as interstate and 50% as intrastate. Sprint suggests that this split is unreasonable because "unlike most other local exchange carriers" it is not an acceptable proxy for Northern Valley's traffic flows. Sprint's arguments are erroneous for two distinct reasons: (1) as detailed above, no carrier will have the default factor applied to its traffic so long as it complies with its duty to provide its own factor (thus the only reasonable conclusion is that a carrier would decline to apply a factor if its particular traffic balance does, in fact, reflect the default 50/50 split provided by the tariff); and (2) Sprint provides no evidence for its assumption that the default is not a reasonable approximation of traffic flows to Northern Valley's network (an analysis that may change by IXC) or its assumption that the 50/50 split is somehow more appropriate for other carriers. In short, Sprint's arguments must fail because it

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3 Available at: http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_fcc1_qcc.htm

makes no demonstration that Northern Valley's revised jurisdictional reporting requirements could be applied in a discriminatory or unlawful manner.

2. THE REVISED DEPOSIT OBLIGATIONS ARE LAWFUL

The *Sprint v. Northern Valley Order* concluded that the deposit provision in Tariff No. 3 was unlawful because it failed to establish a "standard as to when a deposit will be required." *Sprint v. Northern Valley Order* at ¶ 13. The Commission concluded that an "unconstrained ability to impose deposit obligations is susceptible to potentially discriminatory application." *Id.*

Transmittal No. 8 addresses these concerns by establishing that deposits will be required in the following circumstances:

> (a) Buyer has had no previous Access Service; or
>
> (b) Buyer does not have verifiable credit the Company; or
>
> (c) Buyer has had previous verifiable Access Service with the Company but has an outstanding and unpaid bill for Access Service; or has not established satisfactory credit. Satisfactory credit for an Access Service Buyer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment.

Transmittal No. 8 § 3.1.5.1; *see also* § 3.1.5.2.

The tariff revisions also limit Northern Valley's discretion by limiting the amount of the deposit that can be required to "an amount equal to: (a) two months' charges for a Service or facility which has a minimum payment period of one month; or (b) the charges that would apply for the minimum payment period for a Service or facility which has a minimum payment period of more than one month; except that the deposit may include an additional amount in the event that a termination charge is applicable." *Id.* at 3.1.5.1.

These modifications, like the PIU factor language discussed above, were drawn virtually verbatim from the language contained in the access tariff of Qwest Communications Company, LLC. *See* Qwest Communications Company, LLC, FCC Tariff No. 1, § 2.4.1(A). Contrary to Sprint's arguments, Sprint Petition at 3, these revised provisions set a very clear standard (albeit one Sprint may not like) with regard to Northern Valley's ability to require a deposit. There is no basis to find these requirements unlawful.

3. THE REVISED BILLING DISPUTE PROVISIONS ARE LAWFUL

The Commission took issue with the billing dispute provisions in Northern Valley's Tariff No. 3 for three reasons. First, it concluded that the requirement for carriers to dispute bills within 90 days or waive "any and all rights and claims with respect to the bill and the underlying dispute" was unreasonable because it contravenes the two-year statute of limitations in the Communications Act. *Sprint v. Northern Valley Order*, ¶ 14. It also found that requiring carriers to pay disputed charges "at the time of submitting a good faith dispute" was unreasonable in circumstances in which there was a dispute about whether services were actually provided. *Id.* Finally, it found unreasonable the provision stating that Northern Valley is "the *sole judge* of whether any bill dispute has merit." *Id.*

Transmittal No. 8 addresses each of the issues identified in the *Sprint v. Northern Valley Order*. First, Transmittal No. 8 removes the requirement for IXCs to submit a good faith written dispute within 90 days. Transmittal No. 8 at § 3.1.7.1(a). Thus, the provision no longer could be found to conflict with the Act's statute of limitations.

Second, Transmittal No. 8 modifies the requirement for customers to pay charges in all circumstances in order to initiate a good faith dispute. The revised language now provides that "Buyer shall tender payment for any undisputed amounts, as well as payment for any disputed charges relating to traffic in which the Buyer transmitted an interstate telecommunications to the Company's network." Transmittal No. 8 at § 3.1.7.1(b). This provision complies not only with the *Sprint v. Northern Valley Order,* but also the long line of Commission precedent and case law establishing that a LEC is entitled to demand payment for providing services, even if there is a billing dispute. *In re Tel-Central of Jefferson City, Mo., Inc. v. United Tel. of Mo., Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1992) ("[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."); *In re Bus. WATS, Inc. v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) ("The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed….") (citing *In re MCI Telecomms. Corp., Am. Tel. and Tel. Co. & the Pac. Tel. & Tel. Co.*, 62 FCC.2d 703, ¶ 6 (1976)). Here, Northern Valley's tariff has been clearly modified to exclude situations when there is a dispute about whether Northern Valley is, in fact, having interstate interexchange traffic transmitted across its network. This modification prevents Northern Valley from using the payment requirement in an unreasonable manner to demand payment when it is not, in fact, providing service, without erroneously interfering with its right – as provided by Commission precedent – to receive payment in the face of a dispute.

Finally, Transmittal No. 8 removes the language providing that Northern Valley was to be the sole judge of the validity of disputes. It now provides that:

> The Company will evaluate the Buyer's dispute and notify the Buyer in writing of its determination of whether the dispute has been resolved in favor of or against the Buyer. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination.

Transmittal No. 8 at § 3.1.7.1(d).

Despite these changes, Sprint and Qwest lodged misguided attacks and argue the language is still unlawful. These arguments misinterpret the requirements in the *Sprint v.*

Northern Valley Order by suggesting that it essentially precludes Northern Valley from ever demanding payment when an IXC disputes a bill. *See* Sprint Petition at 3-4; Qwest Petition at 4-7. But, the order does not reach this conclusion, nor would it be reasonable to allow IXCs to avoid their payment obligations by proffering any dispute, however pretextual. Thus, the revised dispute provisions strike the appropriate balance of allowing an IXC a full and fair opportunity to dispute a bill, while ensuring that it does so in good faith and without using its non-payment activities as an unfair bargaining tool.

Qwest also suggests requiring an IXC to submit a good faith dispute at all somehow interferes with its right to pursue remedies under Section 206-08 of the Act. Qwest Petition at 7-8. This argument is wholly without merit. Qwest fails to demonstrate that the Commission has ever determined that it is unlawful or a tariff to contain reasonable dispute resolution provisions, and certainly the *Sprint v. Northern Valley Order* makes no such conclusion. Indeed, Qwest Communication Company, LLC's tariff similarly requires all customers to submit disputes in writing to the Company. Qwest Communications Company, LLC, FCC Tariff No. 1, § 2.4.1(C)(2)(c), Original Page 2-29 ("In the event of a billing dispute, the customer must submit a documented claim for the disputed amount."). Thus, Qwest's own conduct demonstrates that Northern Valley's requirement for customer to notify Northern Valley of disputes and give it an opportunity to address the disagreement is both reasonable and lawful.

For the foregoing reasons, Qwest and Sprint have failed to demonstrate that Northern Valley's Transmittal No. 8 is unlawful and has thus provided no basis to reject it. The modification should be allowed to go into effect and receive deemed lawful protection.

B. NO SUSPENSION OR INVESTIGATION IS WARRANTED

Qwest and Sprint have not only failed to demonstrate that the tariff should be rejected, but has also not put forth any valid reason suspend or investigate Northern Valley's Tariff. As described above, Northern Valley appropriately and fully responded to the *Sprint v. Northern Valley Order* by revising its jurisdiction report requirement, deposit, attorney fees, and dispute provisions. Thus, Qwest and Sprint fail to meets their affirmative obligation to demonstrate that there is a "high probability the tariff would be found unlawful after investigation." 47 C.F.R. § 1.773(a)(ii)(A).

Nor have Qwest and Sprint met the other requirements of 47 C.F.R. § 1.773(a)(ii) to justify the suspension or investigation of Transmittal No. 8. With regard to the harm to competition, 47 C.F.R. § 1.773(a)(ii)(B), Sprint argues that it is "yet another attempt to legitimize Northern Valley's activities so that it can bill Sprint and other interexchange carriers an unreasonably high rate for traffic." But, this argument ignores the *Sprint v. Northern Valley Order,* which expressly rejected Sprint's arguments that Northern Valley's tariffed rates were unlawful. Sprint Petition at 4; *Sprint v. Northern Valley Order* at ¶ 18 – 19. In any event, Sprint's argument conveniently ignores the reality that Sprint has not paid Northern Valley's tariffed access charges for conference calling traffic for many years. Indeed, after the Commission rejected Sprint's prior petition to reject, suspend, or investigate when Northern Valley originally filed Tariff No. 3, Sprint continued its practice of refusing to tender *any* payment for conference calling traffic, despite the tariff receiving deemed lawful status. Indeed, as Northern Valley has repeatedly stated, the real harm to competition comes only from the fact that essentially every other long distance carrier pays Northern Valley for the traffic their customers send to the conference calling services on Northern Valley's network, while Qwest and Sprint continue reaping the undue benefit of sending traffic to Northern Valley without any compensation.

Qwest and Sprint's demonstrated refusal to fulfill their common carrier obligations by paying pursuant to deemed lawful tariffs also establish that there is no irreparable injury that will flow from denying their Petitions. 47 C.F.R. § 1.773(a)(ii)(C). Indeed, Northern Valley has been forced to initiate additional collection actions against Qwest and Sprint because of their refusal to pay for any conference calling traffic billed pursuant to Tariff No. 3, and thus it is Northern Valley that would face irreparable injury, through continued and protracted litigation, if the Commission suspends or rejects Transmittal No. 8.

Finally, the public interest would not be served by suspending or investigating Transmittal No. 8. 47 C.F.R. § 1.773(a)(ii)(D). The Commission has proposed rules that would result in lower ***tariffed*** rates for traffic destined to conference calling providers. *See In re: Establishing Just and Reasonable Rates for Local Exchange Carriers*, 26 FCC Rcd. 4554, 4765 (Feb. 9, 2011) (proposing to adopt new rules governing the rates that LECs may include in their tariffs for traffic that is destined to conference calling and similar companies). And, under existing rules, there is no *per se* prohibition against carriers tariffing access charges for calls terminating to these services providers. Thus, suspending or rejecting Northern Valley's Transmittal No. 8 would serve only to prolong uncertainty and embolden Qwest to continue (and perhaps other carriers to commence) nonpayment activities. This, in turn, results in further litigation for Northern Valley, draining it of resources and distracting it from its primary purpose of providing telecommunications services in rural South Dakota. Thus, if the Commission intends to be true to its stated goal of expanding broadband services it rural America, it should acted promptly to bring certainty to the industry and to **ensure that rural LECs actually get paid for the work that they do.** Suspending or rejecting the tariff would not serve this goal.

V. CONCLUSION

For these reasons, the Bureau should reject Qwest's request to reject or suspend Northern Valley Tariff No. 3, Transmittal No. 8. The transmittal should be deemed effective as of 12:01 am Eastern on August 10, 2011.

Dated: August 5, 2011

Respectfully submitted,

By: Ross A. Buntrock

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Counsel for Northern Valley Communications, LLC

CERTIFICATE OF SERVICE

I, Emily L. Johnston, hereby certify that on this 5th day of August 2011, a true and correct copy of the foregoing NORTHERN VALLEY COMMUNICATIONS, LLC RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC AND SPRINT COMMUNICATIONS COMPANY, LP'S PETITIONS TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE was filed via First Class mail, hand delivery *, and electronic mail ** on the following persons:

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DA 11-1393
Released: August 12, 2011

PROTESTED TARIFF TRANSMITTAL
ACTION TAKEN
WCB/Pricing File No. 11-10

Pursuant to authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Pricing Policy Division of the Wireline Competition Bureau has reviewed the petitions to reject or to suspend and investigate the tariff transmittals listed in this Report.

Based on this review, we conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.

Accordingly, the petitions to reject or suspend and investigate the following tariff transmittals are denied, and the transmittals will, or have, become effective on the date specified below. Applications for review and petitions for reconsideration of this decision may be filed within 30 days from the date of this Public Notice in accordance with sections 1.115 and 1.106 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.106.

Additional information about a particular tariff transmittal may be obtained from the contact person at (202) 418-1520.

CARRIER:	**Northern Valley Communications, LLC**
TRANSMITTAL:	**Transmittal No. 8, Tariff F.C.C. No. 3**
SUBJECT:	**Access Services**
PETITIONERS:	**Sprint Communications Company, LP** **Qwest Communications Company, LLC**
EFFECTIVE DATE:	**August 10, 2011**
CONTACT:	**Pamela Arluk at (202) 418-1520**

****

-FCC-

EXHIBIT 7

Excerpts from Level 3 Communications, LLC,
Tariff FCC No. 4 (as revised)

SECTION 1 - DEFINITION OF TERMS

Certain terms used generally throughout this tariff for Communications Service of the Company are (T) defined below. (N) The definitions below apply whether or not the defined term is capitalized in this tariff, although for the convenience of the Customer the Company has endeavored to identify the use of defined terms by capitalizing them where they occur. Where a term defined in this tariff is also defined in the Commission's rules (including without limitation Section 69.2 of those rules), the term in this tariff is to be construed in a manner that is consistent with the definition in the Commission's rules, subject to Section 61.26(a) of those rules, under which access services provided by a competitive local e change carrier (such as the Company) are construed to include services and functions that are the functional e uivalent of access services provided by an incumbent local e change carrier. When terms used in this tariff are not specifically defined, they are intended to be understood as conveying the meaning they are normally given within the United States telecommunications industry (including with reference to the Commission's rules), or, if no such specific meaning exists, their normal English meaning. (N)

Advance Payment: Part or all of a payment re uired before the start of service.

Authorized User: A person, firm or corporation which is authorized by the Customer or Joint User to be connected to the service of the Customer or Joint User, respectively.

Bit: The smallest unit of information in the binary system of notation.

Commission: Federal Communications Commission.

Company: Level 3 Communications, LLC, the issuer of this tariff.

(N) Connection to the PSTN: Any service or facility provided by a carrier that provides the purchaser of the service or facility with the ability to send calls to the PSTN, and to receive calls from the PSTN, based on one or more standard telephone numbers which are assigned by that carrier to the service or facility and which are listed in the database of the Number Portability Administration Center as assigned to that carrier. (N)

Customer: The person, firm or corporation which purchases service and is responsible for the payment of charges and compliance with the Company s regulations.

(N) Direct Trunked Transport: The term "Direct Trunked Transport" refers to any service or arrangement provided by the Company that, in the context of the Company's network configuration, is functionally e uivalent to the facilities and/or services normally referred to as "direct trunked transport" when purchased in connection with switched access services provided by an incumbent local e change carrier. The term generally refers to transport dedicated to the use of a single Customer without switching at a tandem Switch, between the Serving Wire Center and an End Office, or between two Customer-designated End Offices. Depending on the specific arrangements provided to a customer, Direct Trunked Transport may consist of a connection between the Customer's location and/or the Serving Wire Center, and a Company tandem switch. (N)

Certain material previously appearing on this page now appears on Original Page 6.1.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) (T)

15.1.3.4.5.2 Terminating – To 3rd Party (T)

	RATES PER ACCESS MINUTE		
	Tandem Switching	Multiple ing DS3 to DS1	
Alabama	0.001145	N/A	(M)
Alaska	0.000000	N/A	
Arizona	0.002252	0.000036	
Arkansas	0.000288	N/A	
California	0.000440	0.000098	
Colorado	0.002252	0.000036	
Connecticut	0.000634	N/A	
Delaware	0.001574	N/A	
District of Columbia	0.001574	N/A	
Florida	0.001145	0.000380	
Georgia	0.001145	0.000380	
awaii	0.000000	N/A	
Idaho	0.002252	N/A	
Illinois	0.001084	0.000015	
Indiana	0.001084	N/A	
Iowa	0.002252	N/A	
ansas	0.000288	N/A	
entucky	0.001145	N/A	
Louisiana	0.001145	N/A	
Maine	0.001600	N/A	
Maryland	0.001574	N/A	
Massachusetts	0.001574	0.0000	
Michigan	0.001084	0.000015	
Minnesota	0.002252	N/A	
Mississippi	0.001145	N/A	
Missouri	0.000288	0.000047	
Montana	0.002252	N/A	(M)

M – Certain material found on this page was previously located on Page 67.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) (T)

15.1.3.4.5.2 Terminating – To 3rd Party, (cont'd.) (T)

	RATES PER ACCESS MINUTE		
	Tandem Switching	Multiple ing DS3 to DS1	
Nebraska	0.002252	N/A	(M)
Nevada	0.001062	N/A	
New ampshire	0.001600	N/A	
New Jersey	0.001574	N/A	
New Me ico	0.002252	N/A	
New ork	0.001574	0.0000	
North Carolina	0.001145	N/A	
North Dakota	0.002252	N/A	
Ohio	0.002001	0.000240	
Oklahoma	0.000288	N/A	
Oregon	0.002252	N/A	
Pennsylvania	0.001574	0.0000	
Puerto Rico	0.003236	0.000052	
Rhode Island	0.001574	N/A	
South Carolina	0.001145	N/A	
South Dakota	0.002252	N/A	
Tennessee	0.001145	N/A	
Te as	0.000288	0.000047	(M)
U.S. Virgin Islands	0.002821	0.000143	(N)
Utah	0.002252	N/A	(M)
Vermont	0.001600	N/A	
Virginia	0.001574	0.0000	
Washington	0.002252	0.000036	
West Virginia	0.001574	N/A	
Wisconsin	0.001084	N/A	
Wyoming	0.002252	N/A	(M)

M – Certain material found on this page was previously located on Page 68.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.)

15.1.3.4.5.3 Terminating – To Company End Office

	RATES PER ACCESS MINUTE	
	Tandem Switching	Multiple ing DS3 to DS1
Alabama	0.000000 (R)	N/A
Alaska	N/A	N/A
Arizona	0.000000 (R)	0.000000 (R)
Arkansas	0.000000	N/A
California	0.000000	0.000000 (R)
Colorado	0.000000	0.000000
Connecticut	0.000000	N/A
Delaware	0.000000	N/A
District of Columbia	0.000000	N/A
Florida	0.000000	0.000000
Georgia	0.000000 (R)	0.000000
awaii	0.000000	N/A
Idaho	0.000000 (R)	N/A
Illinois	0.000000	0.000000
Indiana	0.000000	N/A
Iowa	0.000000	N/A
ansas	0.000000	N/A
entucky	0.000000	N/A
Louisiana	0.000000	N/A
Maine	0.000000	N/A
Maryland	0.000000	N/A
Massachusetts	0.000000	0.000000
Michigan	0.000000	0.000000
Minnesota	0.000000	N/A
Mississippi	0.000000	N/A
Missouri	0.000000	0.000000
Montana	0.000000 (R)	N/A

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.)

15.1.3.4.5.3 Terminating – To Company End Office, (cont'd.)

	RATES PER ACCESS MINUTE	
	Tandem Switching	Multiple ing DS3 to DS1
Nebraska	0.000000 (R)	N/A
Nevada	0.000000 (R)	N/A
New ampshire	0.000000	N/A
New Jersey	0.000000	N/A
New Me ico	0.000000	N/A
New ork	0.000000	0.0000
North Carolina	0.000000	N/A
North Dakota	0.000000	N/A
Ohio	0.000000	0.00000
Oklahoma	0.000000	N/A
Oregon	0.000000	N/A
Pennsylvania	0.000000	0.0000
Puerto Rico	0.000000	0.0000
Rhode Island	0.000000	N/A
South Carolina	0.000000	N/A
South Dakota	0.000000	N/A
Tennessee	0.000000	N/A
Te as	0.000000	0.0000
U.S. Virgin Islands	0.000000	N/A
Utah	0.000000	N/A
Vermont	0.000000	N/A
Virginia	0.000000	0.0000
Washington	0.000000	0.0000
West Virginia	0.000000	N/A
Wisconsin	0.000000	N/A
Wyoming	0.000000 (R)	N/A

EXHIBIT 8

Excerpt from Neutral Tandem, Inc., Transmittal Letter No. 16 and Revised Tariff FCC No. 2

SECTION 3: SERVICE DESCRIPTIONS

3.3 Access Service (Cont'd)

3.3.3 Customer is responsible for compliance with all third party traffic termination arrangements, including primary toll carrier agreements, and optional and/or extended calling area plans.

3.3.4 In addition to all applicable nonrecurring and monthly recurring charges, Customer for Access Service will be charged a MOU charge for all Access Service traffic delivered to or from the Telephone Company.

3.3.5 Customer for Access Service is the Toll Service provider

3.3.6 Access Service shall be on a Meet Point Billing ("MPB") basis, with all applicable carriers billing their respective portions of the charges directly to the Toll Service provider, and Telephone Company will not be required to function as or use a billing intermediary, e.g. clearinghouse.

3.3.7 The rates charged for Switched Access elements identified herein are applied in a manner such that the rate charged by Neutral Tandem reasonably approximates the rate charged by the relevant Incumbent Local Exchange Carrier for each Switched Access element.

3.3.8 The terminating Tandem-Switched Transport rate schedules are bifurcated into "Standard" and "Affil PCL" rates. The Affil PCL terminating Tandem-Switched Transport rates[1] apply to terminating traffic traversing a Company tandem switch when the terminating carrier is a Company-affiliated price cap carrier. All other terminating Tandem-Switched Transport traffic is subject to the Standard terminating Tandem-Switched Transport rates.[2] **(N)**

[1] Affil PCL terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are subject to the step down specified in Commission Rules 51.907(g)(2) and 51.907(g). **(N)**

[2] Standard terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are not subject to the step down specified in Commission Rules 51.907(g)(2) and 51.907(g). **(N)**

EXHIBIT 9

Excerpt from Onvoy, LLC Tariff FCC No. 1

SECTION 5 - SWITCHED ACCESS SERVICE

II. Provision and Description of Switched Access Service Arrangements (Continued)

C. Rate Categories (Continued)

Definitions of Switched Access Service Rate Categories (Continued)

2. Switched Access End Office Services (Continued)

c. Tandem Switched Transport (Continued)

If the End Office and the Company POI or Access Tandem are in the same wire center building, then no mileage component applies, and no Tandem Switched Transport Facility charge applies. When the End Office is not located in the same wire center building as the Company POI or Access Tandem, mileage measurement is calculated using the V&H coordinates method as described above. The mileage rates are shown in Section 5.VIII.B in terms of per mile per access minute. The amount to be billed shall be the product of the number of miles multiplied by the per mile rate multiplied by the number of access minutes.

A Customer's Point of Presence may be located at the Company's Access Tandem or at the Company POI serving the End Office. When a Customer's Point of Presence is located at the Company's Access Tandem, billing is done as though the connection was made at the Company POI, if applicable, pursuant to Section 2.III.K.(1).

The terminating Tandem-Switched Transport rate schedules are bifurcated into "Standard" and "Affil PCL" rates. The Affil PCL terminating Tandem-Switched Transport rates[1] apply to terminating traffic traversing a Company tandem switch when the terminating carrier is a Company-affiliated price cap carrier. All other terminating Tandem-Switched Transport traffic is subject to the Standard terminating Tandem-Switched Transport rates.[2] **(N)**

3. 8XX Data Base Query

When an 8XX + NXX + XXXX call is originated by an End User, or delivered by a connecting carrier to the Onvoy network unqueried, the Company will perform Customer identification based on screening of the full ten-digits of the 8XX number to determine the Customer location to which the call is to be routed. A Basic Query Charge covers the identification of the toll carrier to whom the call should be delivered. A Vertical Query includes the Basic Query function plus such functions as call validation (ensuring that calls originate from subscriber service areas); POTS translation of 8XX series numbers; alternate POTS translation where End Users can vary the routing of the 8XX calls based on time of day, place, etc.; and multiple carrier routing.

[1] Affil PCL terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are subject to the step down specified in Commission Rules 51.907(g)(2) and 51.907(g). **(N)**

[2] Standard terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are not subject to the step down specified in Commission Rules 51.907(g)(2) and 51.907(g). **(N)**

EXHIBIT 10

Excerpt from Teleport Communications Group Operating Companies, Tariff FCC No. 2, 96th Revision

CHECK SHEET

Pages 1 to 232, inclusive, of this tariff are effective as of the dates shown, except as otherwise noted. Revised or new original pages which contain any changes from the original tariff in effect as of the date hereof are shown below.

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Linda Guay, Tariff Administrator
208 S. Akard Street
Dallas, TX 78202

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* New or revised page

SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements

2.5.1 Payment for Service

The Customer is responsible for the payment of all charges for facilities and services furnished to the Customer or to authorized or joint users.

2.5.2 Taxes and Other Surcharges

(A) General

Customer shall pay all sales, use, gross receipts, excise, access, bypass or other local, state and Federal taxes, charges or surcharges, however designated, imposed on or based upon the provision, sale or use of the Services (excluding taxes on Company's net income). Such taxes shall be separately stated on the applicable invoice.

(B) Universal Connectivity Charge

Services provided pursuant to this tariff are subject to an undiscountable monthly Universal Connectivity Charge. The Universal Connectivity Charge ("UCC") will be applies as a percentage against the Customer's total net interstate and international charges, after application of all applicable discounts and credits. With respect to charges billed on or after April 1, 2003, the UCC percentage will be equal to (subject to rounding) the quarterly Universal Service Fund contribution factor established by the Federal Communications Commission and in effect for that bill period. The applicable quarterly contribution factor can be found at: http://www.fcc.gov/encyclopedia/contribution-factor-quarterly-filings-universal-service-fund-usf-management-support

This change is required by the Federal Communications Commission in a December 13, 2002 decision. In that decision the FCC allows a carrier to recover its Universal Service Fund assessment payments directly from its customers in a separate line item at a rate which does not exceed the applicable USF contribution factor paid by the carrier.

The Federal Communications Commission specifies, on a quarterly basis, what the Universal service fund contribution factor will be and the FCC may change the factor on less than 14 days' notice.

(1) The Company will waive the Universal Connectivity Charge with respect to specifically identified services to the (T)
extent that the Customer demonstrates to the Company's (T)
reasonable satisfaction that:

(a) the Customer either, (i) has filed a Universal Service Worksheet with the Universal Service Administrator covering the twelfth month prior to the month for which the Customer seeks the waiver (i.e., to be eligible for a waiver in September 2002, the Customer must have filed a Universal Service Worksheet

SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements (cont'd)

2.5.2 Taxes and Other Surcharges (cont'd)

2.5 with the Universal Service Administrator covering September 2001), or (ii) was not required to file a Universal Service Worksheet covering such period, either because it was not then providing telecommunications services or because it was then subject to the de minimis exception to the filing requirement;

(b) the charges with respect to which the waiver is sought are for services purchased by Customer for resale; and

(c) the Customer either (i) will file a Universal Service Worksheet with the Universal Service Administrator in which the reported billed revenues will include all billed revenues associated with the Customer's resale of services purchased from the Company for the period during which the waiver is sought or (ii) will not be required to file a Universal Service Worksheet covering such period, because it will be subject to the de minimis exeption to the filing requirement.

(2) The Universal Connectivity Charge will not be waived with respect to:

(a) charges for services purchased by Customer for its own use as an end user; or

(b) charges for which the bill date is on, prior to, or within thirty days after, the date on which the Customer applies for a waiver with respect to those charges; or

(c) charges for services resold by the Customer, if the Customer is not subject to direct universal service contribution requirements.

(C) Administrative Expense Fee

Services provided pursuant to this tariff are subject to an undiscountable monthly Administrative Expense Fee. The Administrative Expense fee is 1.36% of the Customer's total net interstate and international charges, after application of all applicable discounts and credits with respect to charges billed on or after September 1, 2016. (T) (C) (C)

(D) Payphone Use Charge

In addition to all other charges for services under this Service Guide, an undiscountable payphone use charge of $0.60 shall apply to each coinless call which the Company can identify as placed from a domestic payphone by or to the Customer or its permitted users.

SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements (continued)

2.5.2 Taxes and Other Surcharges (continued)

(E) Property Tax Allotment

Services provided pursuant to this Service Guide are subject to an un-discountable monthly Property Tax Allotment (PTA) charge. Based on billing availability, the PTA charge is applied to the Customers total net interstate and international charges after the application of all applicable discounts and credits. For Customer bills dated on or after January 1, 2017, the PTA will be 3.76%.

(F) Federal Regulatory Fee

A Federal Regulatory Fee of 5.25% will be applied to all interstate and US billed international charges, excluding taxes, subject to billing availability, to recover amounts paid to the federal government for regulatory costs and telecommunications services for the hearing impaired. (I)

2.5.3 Service Date

At such time as Company completes installation or connection of the necessary facilities and/or equipment to provide Teleport Communication Service, the Company shall conduct appropriate tests thereon. Upon successful completion of such tests Company shall notify Customer that such services are available for use, and the date of such notice shall be called the "Service Date" and shall be the starting date for billing.

EXHIBIT 11

Excerpt from Teleport Communications Group Operating Companies, Tariff FCC No. 2, 97th Revision

CHECK SHEET

Pages 1 to 232, inclusive, of this tariff are effective as of the dates shown, except as otherwise noted. Revised or new original pages which contain any changes from the original tariff in effect as of the date hereof are shown below.

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29	7th
30	24th *
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88	3rd
88.1	9th
88.1.1	7th
89	5th
90	9th
91	9th
92	5th
92.1	2nd
93	9th
93.1	2nd
94	4th
95	9th
96	7th
96.1	5th
97	9th
98	7th
99	21st
100	23rd
100.1	7th
100.2	3rd
100.3	3rd
101	8th
102	8th
103	6th
103.1	2nd
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105	4th
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107	6th
107.1	3rd
108	7th
109	5th
110	20th
111	22nd

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112	9th
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119	7th
120	5th
121	8th
122	7th
122.1	5th
123	7th
123.1	Original
124	6th
125	18th
126	21st
126.1	6th
126.2	3rd
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126.4	Original
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127.1	Original
128	4th
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129.1	Original
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130.1	1st
131	8th
132	3rd
133	9th
134	6th
134.1	4th
135	6th
135.1	Original
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Dallas, TX 78202

SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements (continued)

2.5.2 Taxes and Other Surcharges (continued)

(E) Property Tax Allotment

Services provided pursuant to this Service Guide are subject to an un-discountable monthly Property Tax Allotment (PTA) charge. Based on billing availability, the PTA charge is applied to the Customers total net interstate and international charges after the application of all applicable discounts and credits. For Customer bills dated on or after August 1,2018 the PTA will be 4.81%. (I)

(F) Federal Regulatory Fee

A Federal Regulatory Fee of 5.25% will be applied to all interstate and US billed international charges, excluding taxes, subject to billing availability, to recover amounts paid to the federal government for regulatory costs and telecommunications services for the hearing impaired.

2.5.3 Service Date

At such time as Company completes installation or connection of the necessary facilities and/or equipment to provide Teleport Communication Service, the Company shall conduct appropriate tests thereon. Upon successful completion of such tests Company shall notify Customer that such services are available for use, and the date of such notice shall be called the "Service Date" and shall be the starting date for billing.

EXHIBIT 12

Excerpt from Teleport Communications Group Operating Companies, Tariff FCC No. 2, 98th Revision

CHECK SHEET

Pages 1 to 232, inclusive, of this tariff are effective as of the dates shown, except as otherwise noted. Revised or new original pages which contain any changes from the original tariff in effect as of the date hereof are shown below.

Page	**Revision**	**Page**	**Revision**	**Page**	**Revision**	**Page**	**Revision**
1	98th*	44	2nd	76	6th	111.1	7th
2	63rd	45	5th	77	6th	111.2	3rd
3	47th	46	3rd	78	5th	111.3	3rd
4	45th	47	2nd	79	6th	112	9th
5	35th	48	1st	80	6th	113	8th
6	1st	49	2nd	81	7th	114	8th
7	1st	50	2nd	82	7th	115	10th
8	2nd	51	1st	83	7th	116	10th
9	5th	52	3rd	84	5th	117	8th
9.1	Original	53	4th	85	4th	117.1	2nd
10	2nd	54	3rd	86	3rd	118	9th
11	2nd	55	3rd	87	5th	119	7th
12	3rd	56	3rd	88	3rd	120	5th
13	1st	57	4th	88.1	9th	121	8th
14	2nd	58	4th	88.1.1	7th	122	7th
15	2nd	58.1	Original	89	5th	122.1	5th
16	1st	58.2	Original	90	9th	123	7th
17	1st	59	5th	91	9th	123.1	Original
18	1st	60	5th	92	5th	124	6th
19	1st	60.2	1st	92.1	2nd	125	18th
20	1st	61	8th	93	9th	126	21st
21	1st	62	5th	93.1	2nd	126.1	6th
22	1st	63	4th	94	4th	126.2	3rd
23	1st	64	4th	95	9th	126.3	3rd
24	1st	65	7th	96	7th	126.4	Original
25	2nd	65.1	1st	96.1	5th	127	9th
26	1st	66	3rd	97	9th	127.1	Original
27	2nd	67	4th	98	7th	128	4th
28	8th	68	2nd	99	21st	129	8th
29	7th	69	4th	100	23rd	129.1	Original
30	25th *	70	4th	100.1	7th	130	8th
31	4th	71	4th	100.2	3rd	130.1	1st
31.1	Original	71.1	Original	100.3	3rd	131	8th
31.2	Original	71.2	Original	101	8th	132	3rd
32	4th	71.3	1st	102	8th	133	9th
33	1st	71.3.1	Original	103	6th	134	6th
34	1st	71.4	3rd	103.1	2nd	134.1	4th
35	1st	71.4.1	Original	104	7th	135	6th
36	1st	71.5	4th	105	4th	135.1	Original
37	1st	71.6	2nd	106	8th	136	5th
38	1st	71.7	Original	107	6th	137	19th
39	1st	72	9th	107.1	3rd	138	18th
39.1	2nd	73	10th	108	7th	138.1	7th
40	1st	74	5th	109	5th	138.2	3rd
41	3rd	74.1	1st	110	20th	138.3	3rd
42	2nd	74.2	1st	111	22nd	138.4	2nd
43	4th	75	6th				

* New or revised page

Issued: August 31, 2018 Effective: September 1, 2018

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SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements (continued)

2.5.2 Taxes and Other Surcharges (continued)

(E) Property Tax Allotment

Services provided pursuant to this Service Guide are subject to an un-discountable monthly Property Tax Allotment (PTA) charge. Based on billing availability, the PTA charge is applied to the Customers total net interstate and international charges after the application of all applicable discounts and credits. For Customer bills dated on or after August 1,2018 the PTA will be 4.81%.

(F) Federal Regulatory Fee

A Federal Regulatory Fee of 6.38% will be applied to all interstate and US billed international charges, excluding taxes, subject to billing availability, to recover amounts paid to the federal government for regulatory costs and telecommunications services for the hearing impaired. (I)

2.5.3 Service Date

At such time as Company completes installation or connection of the necessary facilities and/or equipment to provide Teleport Communication Service, the Company shall conduct appropriate tests thereon. Upon successful completion of such tests Company shall notify Customer that such services are available for use, and the date of such notice shall be called the "Service Date" and shall be the starting date for billing.

EXHIBIT 13

Excerpt from Teleport Communications Group Operating Companies, Tariff FCC, 99th Revision

CHECK SHEET

Pages 1 to 232, inclusive, of this tariff are effective as of the dates shown, except as otherwise noted. Revised or new original pages which contain any changes from the original tariff in effect as of the date hereof are shown below.

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9.1	Original
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26	1st
27	2nd
28	8th
29	7th
30	26th *
31	4th
31.1	Original
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32	4th
33	1st
34	1st
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47	2nd
48	1st
49	2nd
50	2nd
51	1st
52	3rd
53	4th
54	3rd
55	3rd
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57	4th
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59	5th
60	5th
60.2	1st
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63	4th
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65.1	1st
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67	4th
68	2nd
69	4th
70	4th
71	4th
71.1	Original
71.2	Original
71.3	1st
71.3.1	Original
71.4	3rd
71.4.1	Original
71.5	4th
71.6	2nd
71.7	Original
72	9th
73	10th
74	5th
74.1	1st
74.2	1st
75	6th

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128	4th
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135.1	Original
136	5th
137	19th
138	18th
138.1	7th
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138.4	2nd

* New or revised page

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Dallas, TX 78202

SECTION 2 - GENERAL REGULATIONS (Cont'd.)

2.5. Payment Arrangements (continued)

2.5.2 Taxes and Other Surcharges (continued)

(E) Property Tax Allotment

Services provided pursuant to this Service Guide are subject to an un-discountable monthly Property Tax Allotment (PTA) charge. Based on billing availability, the PTA charge is applied to the Customers total net interstate and international charges after the application of all applicable discounts and credits. For Customer bills dated on or after August 1,2018 the PTA will be 5.30%. (I)

(F) Federal Regulatory Fee

A Federal Regulatory Fee of 6.38% will be applied to all interstate and US billed international charges, excluding taxes, subject to billing availability, to recover amounts paid to the federal government for regulatory costs and telecommunications services for the hearing impaired.

2.5.3 Service Date

At such time as Company completes installation or connection of the necessary facilities and/or equipment to provide Teleport Communication Service, the Company shall conduct appropriate tests thereon. Upon successful completion of such tests Company shall notify Customer that such services are available for use, and the date of such notice shall be called the "Service Date" and shall be the starting date for billing.

EXHIBIT 14

Excerpts from Verizon Telephone Companies,
Tariff FCC No. 1, 6th, 18th Revisions

ACCESS SERVICE

1. Application of Tariff

1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided to customers by the following telephone companies of the Verizon Telephone Companies as issuing carriers: Verizon Pennsylvania LLC, Verizon New Jersey Inc., Verizon Delaware LLC, (T)
Verizon Washington, D.C. Inc., Verizon Maryland LLC, and Verizon (T)
Virginia LLC, hereinafter referred to as the Telephone Company.

1.2 The provision of such services by the Telephone Company as set forth in this tariff does not constitute a joint undertaking with the customer for the furnishing of any service.

1.3 The operating territory of the Telephone Company is the entire state of Delaware and the locations set forth in 14. following for the states of Maryland, New Jersey, Pennsylvania, Virginia, and the District of Columbia.

1.4 References in this tariff to local general services tariffs constitute the referencing of any state jurisdiction tariff approved by a state regulatory commission, or its equivalent, for any of the issuing carriers mentioned in 1.1 above.

1.5 References in this tariff to Interstate Special Construction Tariffs refer to the following tariff as effective in their respective territories:

Tariff F.C.C. NO. 21 for Verizon Washington, D.C. Inc.,
Verizon Maryland LLC, Verizon Virginia (T)
LLC, Verizon New Jersey Inc., Verizon
Pennsylvania LLC, and Verizon Delaware (T)
LLC

6. Switched Access Service (Cont'd)

6.9 Rates and Charges (Cont'd)

6.9.1 Switched Transport (Cont'd)

(B) Tandem Switched Transport

All Rate Zones - Per MOU	Originating	Terminating To Telephone Company End Offices		Terminating to Third Party
Tandem Transport - Fixed	$.000000	$.000000		$.000000
Tandem Transport - Per Mile	$.000002	$.000000		$.000002
Tandem Switching	$.001574	$.000000	(R)	$.001574
Transport Multiplexing (DS3 to DS1)	$.000000	$.000000		$.000000
Host/Remote-Fixed -Per MOU	$.000000	$.000000		
- Host/Remote-Per Mile -Per MOU	.000000	.000000		

Dedicated Tandem Trunk Port Charge

	USOC	Monthly Rate
- per Trunk	PT8NX	$12.50

EXHIBIT 15

Excerpts from Verizon Telephone Companies, Tariff FCC No. 11, 3rd, 16th Revisions

ACCESS SERVICE

1. Application of Tariff

1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line Access, End User Access, Switched Access, Special Access, Lifeline Assistance, Universal Service Fund and other miscellaneous services, hereinafter referred to collectively as service(s), provided by Verizon New England Inc. and Verizon New York Inc., hereinafter referred to collectively as the Telephone Company, to customers.

In addition, this tariff is applicable to the following service not utilizing Telephone Company end office switches: service between points in the New York - New Jersey Corridor (i.e., Corridor Service); Cragmere, New Jersey foreign exchange service provided to Suffern, New York customers; and service which is physically interstate but within the same LATA. Such service is subject to the regulations, rates and charges for Special Access Services except as provided in 2.4.8, 2.4.9 and 2.4.10 following.

1.2 The provision of such services by the Telephone Company as set forth in this tariff does not constitute a joint undertaking with the customer for the furnishing of any service.

1.3 The operating territory of THE VERIZON TELEPHONE COMPANIES encompasses the following locations.

1.3.1 The operating territory of Verizon New England Inc. is the entire state of Rhode Island and the locations set forth in Section 15. following for Massachusetts. (D)

1.3.2 The operating territory of Verizon New York Inc. is the locations set forth in Section 15. following for the States of New York and Connecticut.

1.4 References in this tariff to the Interstate Special Construction Tariff are being made to the following tariff as effective in its respective territories:

Tariff F.C.C. No. 21 for Verizon New England Inc. and Verizon New York Inc.

31. The Verizon Telephone Companies Rates and Charges (Cont'd)

31.6 Switched Access Service (Cont'd)

31.6.1 Local Transport (Cont'd)

(B) Tandem Switched Transport and Host/Remote Switched Transport (Cont'd)

All States All Pricing Zones	Originating	Terminating To Telephone Company End Offices	Terminating to Third Party
(3) Tandem Switching - Per Minute of Use			
	$.001574	$.000000 (R)	$.001574
(4) Transport Multiplexing (DS3 to DS1) - Per Minute of Use			
	$.000000	$.000000	$.000000

EXHIBIT 16

Excerpts from Verizon Telephone Companies, Tariff FCC No. 14, 9th, 5th, 23rd Revisions

FACILITIES FOR INTERSTATE ACCESS

ISSUING CARRIERS

Verizon North LLC
For the State of: Pennsylvania

(D)
(D)

(D)
(D)

Verizon South Inc.
For the State of: Virginia

(D)
(D)

The original effective date for the Verizon Telephone Companies Tariff FCC No. 14 is May 2, 2001.

1. APPLICATION OF TARIFF

1.1 This tariff contains regulations, rates and charges applicable to Carrier Common Line, Switched Access, Special Access, End User Access, Lifeline Assistance, Universal Service Fund, Expanded Interconnection Service, Advanced Communications Networks, Optical Networking Access Service or, in combination, as Facilities for Interstate Access, hereinafter referred to as FIA, provided by the issuing carriers of this tariff, hereinafter referred to as the Telephone Company to customers. This tariff further provides for Ancillary and Miscellaneous Services. This tariff does not apply to other services offered by the Telephone Company.

1.2 Regulations, rates and charges as specified in this tariff apply to FIA and shall not serve as a substitute for IC tariff offerings of services to end users. The provision of such FIA by the Telephone Company as set forth in this tariff does not constitute a joint undertaking with an IC for the furnishing of any service.

1.3 References in this tariff to a Special Construction Tariff refers to the following tariff as effective in its respective territories:

TARIFF F.C.C. NO. 21 for Verizon North LLC and Verizon South Inc. (D)

4. SWITCHED ACCESS (Cont'd)

4.6 Rates and Charges (Cont'd)

4.6.2 Switched Transport (Cont'd)

(C) Tandem Switching Rate

Tandem Switching Rate

	Originating	Terminating To Telephone Company End Offices	Terminating to Third Party
All Rate Zones – Per Access Minute			
(USOC)			
Jurisdiction			
Pennsylvania	$.001574	$.000000 (R)	$.001574
Virginia	.001574	.000000 (R)	.001574

EXHIBIT 17

Excerpts from Verizon Telephone Companies,
Tariff FCC No. 16, 6th, 5th, 11th, 10th, 14th Revisions

ACCESS SERVICE

ISSUING CARRIERS

I. All Regulations, Rates and Charges presented in this tariff are applicable to the following Issuing Carriers. Wire center locations for these Issuing Carriers are located in National Exchange Carrier Association Tariff FCC No. 4.

Verizon North LLC
For the State of: Pennsylvania

Verizon South Inc.
For the States of: North Carolina
Virginia

(D)
(D)
(D)

(D)
(D)

The original effective date for The Verizon Telephone Companies Tariff F.C.C. No. 16 is May 1, 2001.

1. Application of Tariff

1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Lifeline Assistance, Universal Service Fund, Switched Access, Special Access Services, Expanded Interconnection Service, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Issuing Carriers of this tariff, hereinafter referred to as the Telephone Company, to customers.

1.2 The provision of such services by the Telephone Company as set forth in this tariff does not constitute a joint undertaking with the customer for the furnishing of any service.

1.3 References in this tariff to a Special Construction Tariff refers to the following tariff as effective in its respective territories:

TARIFF F.C.C. NO. 21 for Verizon North LLC and Verizon South Inc. (D)

6. Switched Access Service (Cont'd)

6.6 Switched Access Rates and Charges (Cont'd)

6.6.6 North Carolina (Cont'd)

		Originating	Terminating To Telephone Company End Offices	Terminating to Third Party
(L)	Tandem-Switched Transport – Facility - Per Access Minute, Per Airline Mile	$.000002	$.000000	$.000002
(M)	Tandem-Switched Transport – Termination - Per Access Minute, Per Termination	$.000000	$.000000	$.000000
(N)	Tandem Switching Rate - Per Access Minute (USOC)	$.001574	$.000000 (R)	$.001574

ACCESS SERVICE

6. Switched Access Service (Cont'd)

6.6 Switched Access Rates and Charges (Cont'd)

6.6.7 Pennsylvania (Cont'd)

		Originating	Terminating To Telephone Company End Offices	Terminating to Third Party
(L)	Tandem-Switched Transport - Facility - Per Access Minute, Per Airline Mile	$.000002	$.000000	$.000002
(M)	Tandem-Switched Transport - Termination - Per Access Minute, Per Termination	$.000000	$.000000	$.000000
(N)	Tandem Switching Rate - Per Access Minute (USOC)	$.001574	$.000000 (R)	$.001574

ACCESS SERVICE

6. Switched Access Service (Cont'd)

6.6 Switched Access Rates and Charges (Cont'd)

6.6.10 Virginia (Cont'd)

		Originating	Terminating To Telephone Company End Offices	Terminating to Third Party
(L)	Tandem-Switched Transport - Facility - Per Access Minute, Per Airline Mile	$.000002	$.000000	$.000002
(M)	Tandem-Switched Transport - Termination - Per Access Minute, Per Termination	$.000000	$.000000	$.000000
(N)	Tandem Switching Rate - Per Access Minute (USOC)	$.001574	$.000000 (R)	$.001574

EXHIBIT 18

Excerpt from West Telecom Services, LLC, Tariff FCC No.1

SECTION 3 - DESCRIPTION OF SERVICE, (CONT'D.)

3.4 Access Services Offerings, (Cont'd.)

3.4.1 Switched Access Service

Switched Access Service is available to a Customer for its use in furnishing service to an End-User, as those terms are defined in 1.1, above. This service allows access to the switched network of an Exchange Carrier or other Provider for the primary or sole purpose of originating and/or terminating toll and/or interMTA communications.

A. There are several rate categories which apply to Switched Access Service:

- Tandem Switched Access Originating
- Tandem Switched Access Terminating
- Local Switching – Originating or Terminating

The Company provides originating and terminating switched access service based on aggregate traffic volumes from the following rate categories:

1. Tandem Switched Access ("Switched Transport")

The Switched Transport rate category includes the charges related to the transmission and termination of facilities between the Customer designated premises (Point of Presence) and Company's access tandem, and between the Company's access tandem, and the end office switch(es) where the Customer's traffic is switched to originate or terminate the Customer's communications, or any functional equivalent of the incumbent local exchange carrier Switched Transport access service provided by the Company via analogous facilities.

Switched Transport may incorporate a dedicated or common path between the Customer's Point of Presence and the Company's switch or a common transmission path from Exchange Carrier(s) switch(es) connected to the Company's switch. The charges that apply, where applicable, to Switched Transport include Tandem Switching, Tandem Common Trunk Port, Tandem Multiplexing, Tandem Switched Transport – Termination, and Tandem Switched Transport – Facility.

The terminating Switched Transport rate schedules are bifurcated into "Affiliated Price Cap LEC End Office" and "All Other End Offices" rates, which includes 3rd party traffic. The Company bills the Price Cap LEC End Office or the Non-Price Cap LEC End Office terminating Switched Transport rate schedule based on the rates the competing Price Cap LEC would charge for switched transport traffic delivered to the same terminating End Office. In other words, the Company mirrors the Switched Transport rates the Price Cap LEC would charge if it were the terminating Switched Transport provider rather than the Company. (T)